# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1958

## No. 285

UNITED STATES OF AMERICA, PETITIONER,

*vs.*

ISTHMIAN STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

# Supreme Court of the United States

OCTOBER TERM, 1958

# No. 285

UNITED STATES OF AMERICA, PETITIONER,

*vs.*

ISTHMIAN STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. A] IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 24415

ISTHMIAN STEAMSHIP COMPANY,
*Libelant-Appellee.*

v.

UNITED STATES OF AMERICA,
*Respondent-Appellant.*

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On Appeal from the United States District Court
For the Southern District of New York

• • • •

[File endorsement omitted]

[fol. 1] Appendix to Appellant's Brief—Filed April 23, 1957

IN UNITED STATES DISTRICT COURT

Southern District of New York

Ad. 185-33

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Isthmian Steamship Company, a Delaware corporation, owner of the American Steamship "Steel Worker" and other vessels

vs.

The United States of America

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DOCKET ENTRIES

Basis of Action: Breach of Contract—$115,203.76.

PROCTORS

*For Libelant:*

KIRLIN CAMPBELL & KEATING
120 Broadway (5)

*For Respondent:*

U. S. Atty.
5 & 6

| Date | | Filings—Proceedings |
|---|---|---|
| Mar. 29-55 | Filed | libel & stip. for costs ($100. Federal Insurance Co.) |
| Apr. 5-55 | " | affidavit of service upon U. S. Atty. and Attorney General. |
| June 14-55 | " | stip. for claimants' or respondent's costs ($100. Federal Insurance Co.) |
| [fol. 2] | | |
| June 23-55 | " | answer of U. S. A. |
| June 24-55 | " | notice of motion re: to consolidate causes for trial. Ret. 6/28/55. (Also in A185-274). |
| July 15-55 | " | exceptions to answer and notice of motion. Ret. 7/26/55. |
| Aug. 10-55 | " | Opinion #22093. Dimock, J. Isthmian's exceptions are sustained and its application for a decree granting the relief sought by it in A 185-33 is granted. Gov's. motion for consolidation is denied. |
| Aug. 9-55 | Memo. | end. on motion papers filed 7/15/55. See memorandum. Dimock, J. |
| Sept. 8-55 | Filed | order denying motion to consolidate this cause and A185-274. Dimock, J. |
| Sept. 19-55 | " | Libelant's bill of costs taxed at $40.00 Clerk. |
| (B) | | |
| Sept. 26-55 | Filed | unsigned order. |

| Date | | Filings—Proceedings |
|---|---|---|
| Sept. 26-55 | Filed | final decree. Exceptions sustained. Isthmian S. S. Co. recover from the U. S. A. the sum of $115,203.76. Dimock, J. |
| Dec. 19-55 | " | Notice of Appeal. |
| Nov. 29-56 | " | Stipulation of omissions from record on appeal to USCCA. |
| Nov. 30-56 | Filed | notice of certification of record on appeal to USCCA. |

[fol. 3] IN UNITED STATES DISTRICT COURT

LIBEL AND COMPLAINT—filed March 29, 1955

A. 185-33

*To the Honorable the Judges of the United States District Court for the Southern District of New York*

The libel and complaint of ISTHMIAN STEAMSHIP COMPANY, a Delaware corporation, owner of the American Steamship *Steel Worker* and other vessels,

—against—

THE UNITED STATES OF AMERICA, in a cause of contract, civil and maritime, alleges on information and belief, as follows:

First: Libelant, Isthmian Steamship Company, is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 71 Broadway, New York, N. Y. and at all such times libelant was the owner of the *SS. Steel Worker.* Respondent is the United States of America, a sovereign state.

Second: Jurisdiction of this Court is invoked under the Suits in Admiralty Act, 46 U. S. C. 741 *et seq.*, 41 Stat. 525 *et seq.*

Third: Within the last two years respondent became obligated to libelant for the cost of transportation by

water on the *S.S. Steel Worker* of certain cargo owned or possessed by respondent acting through Military Sea Transportation Service, an agency of respondent, for which respondent agreed to pay libelant freight pursuant [fol. 4] to Government Bill of Lading No. WY-1904360, issued by libelant and accepted by respondent, covering said transportation.

Fourth: In due course libelant submitted to respondent an accomplished bill of lading and public voucher for payment of freight in the amount of $116,511.44. However, respondent has failed and refused to pay the sum of $115,203.76 due under said bill of lading to libelant.

Fifth: Libelant has performed all obligations and conditions on its part to be performed under the bill of lading. Payment has been duly demanded by libelant but respondent has in breach of said bill of lading contract refused and still refuses payment.

WHEREFORE, libelant prays judgment against respondent in the amount of $115,203.76, together with such interest as is allowable thereon for delay in payment and for such other and further relief as to the Court may seem just and proper.

KIRLIN CAMPBELL & KEATING

Proctors for Libelant,

Office & P. O. Address:
120 Broadway,
New York 5, N. Y.

(Verification not printed.)

[fol. 5] IN UNITED STATES DISTRICT COURT

ANSWER—filed June 23, 1955

The respondent, answering the libel herein:

1. Admits the allegations contained in Article designated First thereof.

2. Admits the allegations contained in Article designated Second thereof.

3. Admits the allegations contained in Article designated Third thereof.

4. Denies each and every allegation contained in Article designated Fourth thereof except that respondent admits that libelant submitted to respondent a bill of lading and public voucher for payment of freight in the amount of $116,511.44.

5. Denies each and every allegation contained in Article designated Fifth thereof except that the respondent admits that payment of the sum of $115,203.76 has been demanded by libelant and respondent affirmatively alleges that the sum was paid by respondent to libelant.

FOR A SEPARATE AND COMPLETE DEFENSE, RESPONDENT ALLEGES AS FOLLOWS:

6. Heretofore and on February 7, 1942, pursuant to Executive Order 9054, the President of the United States [fol. 6] established the War Shipping Administration under the direction of an administrator appointed by the President and said administrator assumed certain functions, (5) duties and powers of the United States Maritime Commission theretofore conferred upon the United States Maritime Commission under the Merchant Marine Act, 1936, as amended.

7. On the 1st day of September 1946, the control, functions, duties and powers of the United States Maritime Commission which had theretofore been transferred to the War Shipping Administration were again vested in the United States Maritime Commission until the 24th day of May 1950, when the control, functions, duties and powers of the United States Maritime Commission were transferred to the United States Department of Commerce, Maritime Administration.

8. On June 13, 1946 and as of April 29, 1946 the respondent, acting by and through the Administrator, War Shipping Administration, and libelant entered into an agreement in writing bearing No. WSA 12800, designated Warshipdemiseout Form 203, pursuant to the terms of which the respondent chartered to the libelant the vessels *Cape Elizabeth, Oriental, Cape Martin, Sea Scorpion, Sea Cardinal, Sea Stallion, Sovereign of the Seas* and *Morning Light* on a bareboat basis at the basic charter hire rates therein specified for each calendar month for each of said vessels and, for the terms of said agreement, respondent asks leave to present said agreement upon the trial of this proceeding.

[fol. 7] 9. Said agreement provided in Part I, Clause A, as follows:

> "*Uniform Terms.* This Agreement consists of this Part I, and Part II published in the Federal Register of April 27, 1946, the provisions of said Part II being incorporated by reference as part of this agreement. Unless otherwise in this Part I expressly provided, all of the provisions of said Part II shall be a part of this Agreement as though fully (6) set forth in this Part I. In the event of a conflict between the provisions of Parts I and II, the provisions of Part I shall govern to the extent of such conflict."

10. Clause 13 of Part II of said agreement provided as follows:

> "*Additional Charter Hire.* After redelivery of all Vessels under this Agreement, if the cumulative net voyage profits computed for the period of the agreement (after the payment of the basic charter hire provided herein and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall be in excess of a rate of ten (10) per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels during the period of the agreement (all as hereinafter defined in Clause 23) the Charterer shall pay to the Owner at Washington, D. C. within sixty (60) days thereafter, an amount equal to one-half of such cumulative net voyage profit in excess of an

amount computed for the period of the agreement at [fol. 8] the rate of ten (10) per centum per annum on such capital as hire in addition to the hire payable under Clause 12; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment upon the completion of final audit by the Owner, at which time such payments will be made by or to the Owner as such final audit may show to be due. The Charterer shall, (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in accordance with the 'Uniform System of Accounts for Operating-Differential Subsidy Contractors' prescribed by the United States Maritime Commission in its General Order No. 22 and under such regulations as may be prescribed by the Owner: *provided*, however, that, if the Charterer is subject to the jurisdiction of the Interstate Commerce Commission, the Owner shall not require the duplication of books, records, and accounts, required to be kept in some other form by that Commission; and (2) file, upon notice from the Owner, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the Owner, affect the results in, the performance of, or transactions or operations (7) under this Agreement. The Owner is hereby authorized to examine and audit the books, records, and accounts of the Chaterer in so far as the same relate to operations under this Agreement whenever it may deem it necessary or desirable so to do."

[fol. 9] 11. Pursuant to the terms and provisions of Clause 13 of Part II of said agreement referred to in Articles Fifth, Sixth and Seventh hereof, the libelant was required to pay to the respondent additional charter hire in the sum of $115,203.76 for the use of vessels chartered to the libelant during the period May 1, 1946 to and including July 31, 1948.

12. Respondent has duly performed all of the terms, covenants and conditions of the agreement on its part to be performed.

13. On June 3, 1953 the sum of $115,203.76 claimed by the libelant herein was paid by the respondent by the application and set-off of the sum of $115,203.76 which was then due and owing by the libelant to the respondent as herein alleged.

WHEREFORE, respondent prays that the libel herein be dismissed with costs.

J. EDWARD LUMBARD
United States Attorney
Proctor for Respondent
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

(Verification not printed)

[fol. 10] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,

—against—

UNITED STATES OF AMERICA,
Respondent.

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A. 185-274

UNITED STATES OF AMERICA,
Libelant,

—against—

ISTHMIAN STEAMSHIP COMPANY,
Respondent.

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NOTICE OF MOTION TO CONSOLIDATE CAUSES FOR TRIAL—
dated June 23, 1955

*Sirs:*

PLEASE TAKE NOTICE that upon the annexed affidavit of Benjamin H. Berman duly sworn to June 23, 1955, the pleadings herein and on all the proceedings heretofore had herein, the undersigned will move this Court at a Stated Term for Motions thereof to be held in the United [fol. 11] States Court House, Room 506, Foley Square, in the Borough of Manhattan, City of New York on the 28th day of June, 1955 at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 13 of the Admiralty Rules of this Court, consolidating the above-captioned causes for trial

together and for such other and further relief as to the Court may seem just in the premises.

Dated: New York, N. Y.
June 23, 1955.

Yours, etc.

J. EDWARD LUMBARD
United States Attorney
Proctor for United States of America
607 U. S. Court House
Foley Square.
New York 7, N. Y.

To:

Kirlin, Campbell & Keating, Esqs.
Proctors for Isthmian Steamship Company
120 Broadway
New York 5, N. Y.

[fol. 12] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF BENJAMIN H. BERMAN

State of New York,
County of New York—ss.:

BENJAMIN H. BERMAN, being duly sworn, deposes and says:

I am an attorney in the United States Department of Justice and I am familiar with the proceedings heretofore had in these suits. I make this affidavit in support of the respondent's motion to consolidate the cause in which Isthmian Steamship Company is libelant (Ad. 185-33) with the suit entitled *United States Of America* v. *Isthmian Steamship Company*, Admiralty Docket No. 185-274, in which the Government sues to recover an amount equal to that claimed by the libelant in the suit bearing Admiralty Docket No. 185-33.

This motion is made pursuant to Admiralty Rule 13 of the rules of this Court which said rule provides as follows: (10)

> "When various suits are pending, all resting upon the same matter of right or defense, although there be no common interest between the parties, the court may consolidate or compel said suits to be tried togther, and enter a single decree or decrees in each cause."

The suit by Isthmian Steamship Company against the Government was instituted by the libelant on March 29, 1955 to recover the sum of $115,203.76, freight moneys due to Isthmian Steamship Company from the Department of the Navy, Military Sea Transportation Service. An answer pleading payment has been interposed by the respondent. The answer admits that the Government was [fol. 13] originally indebted to Isthmian Steamship Company for the amount claimed in the libel and affirmatively alleges that the indebtedness was fully paid by the setting off and payment of the amount thereof upon a claim against Isthmian Steamship Company for $115,203.76 by the Maritime Administration for additional charter hire in connection with the chartering of several vessels by the War Shipping Administration to Isthmian Steamship Company.

The liability of Isthmian Steamship Company for additional charter hire is disputed by it and the claim has therefore been made the subject of a suit instituted in this court by the Government against it (Admiralty Docket No. 185-274). It is this latter suit which the Government seeks to have consolidated with the suit by Isthmian Steamship Company against the Government.

There is the one issue to be litigated in the disposition of both suits. The issue is that raised by the separate defense pleaded in the answer in the suit against the Government wherein it is alleged that the Navy Department, through the Military Sea Transportation Service, was indebted to Isthmian Steamship Company for $113,203.76 and that the indebtedness was paid by setting off the claim of the Maritime Administration against the libelant for an (11) equal amount. The question common

to both suits is whether Isthmian Steamship Company was indebted to the Government for $115,203.76 for additional charter hire for vessels chartered to it by the War Shipping Administration. The determination of that question would dispose of both suits.

I respectfully ask that the respondent's motion to consolidate both suits be granted.

BENJAMIN H. BERMAN

(Sworn to June 23, 1955)

[fol 14] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 185-33

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ISTHMIAN STEAMSHIP COMPANY,
Libelant,

—against—

UNITED STATES OF AMERICA,
Respondent.

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NOTICE OF HEARING ON EXCEPTION TO ANSWER—dated July 14, 1955

*Sirs:*

Please Take Notice that the exceptions of the libelant will be brought on for hearing at a Stated Term for Motions to be held at the United States Court House, Room 506, Foley Square, in the Borough of Manhattan, City of New York, on the 26th day of July, 1955, at 10 o'clock in the forenoon.

Dated: New York, N. Y.
July 14, 1955.

Yours, etc.

KIRLIN, CAMPBELL & KEATING,
Proctors for Isthmian Steamship Company
120 Broadway
New York 5, New York

To:

J. EDWARD LUMBARD, Esq.
United States Attorney
Proctor for United States of America
607 U. S. Court House
Foley Square
New York 7, N. Y.

[fol. 15] IN UNITED STATES DISTRICT COURT

LIBELANT'S EXCEPTION TO ANSWER—Dated July 14, 1955

The libelant excepts to the answer of respondent and asks for judgment on the pleadings on the following grounds:

First: The answer does not constitute a defense to the cause of action set forth in the libel.

Second: The matter set forth in paragraphs 6 through 13 of the answer may not be pleaded as a defense to the cause of action set forth in the libel because it does not arise out of the same contract, cause of action or transaction for which the libel was filed.

Third: Libelant excepts to paragraph 4 wherein respondent "denies each and every allegation in Article designated Fourth" of the libel except as admitted and paragraph 5 wherein respondent "denies each and every allegation contained in Article designated Fifth" of the libel except as admitted. The basis of these denials is that (as alleged in paragraph 13 of the answer), "on June 3, 1953 the sum of $115,203.76 claimed by the libelant herein was paid by the respondent by the application and set-off of the sum of $115,203.76 which was then due and owing by the libelant to the respondent." It appears from articles 6 through 11 of the answer that this alleged set-off is a disputed claim by respondent for additional hire said to (14) have accrued between May 1, 1946 and July 31, 1948 under a bareboat charter dated as of April 29, [fol. 16] 1946, whereby eight government-owned vessels were chartered to libelant. Therefore it appears on the face of the answer that the attempted set-off arises out of a different contract which had terminated more than four years before the issuance of the bill of lading and the making of the shipment out of which libelant's claim for freight in this suit arose. Respondent cannot properly set-off damages arising out of another contract, cause of action or transaction.

Fourth: Respondent admits that it "became obligated to libelant for the cost of transportation by water on the *SS Steel Worker* of certain cargo owned or possessed by respondent * * * for which respondent agreed to pay

libelant freight pursuant to Government Bill of Lading No. WY1904360, issued by libelant and accepted by respondent covering said transportation" and respondent has not pleaded any proper defense in its answer. Therefore libelant is entitled to judgment against respondent on the pleadings.

WHEREFORE, libelant prays that the matter excepted to be stricken from the answer and that libelant be given judgment on the pleadings.

Dated: New York, N. Y.
July 14, 1955.

Yours, etc.

KIRLIN, CAMPBELL & KEATING,
Proctors for libelant
Office & P. O. Address
120 Broadway
New York 5, New York

[fol. 17] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,
—against—
UNITED STATES OF AMERICA,
Respondent.

A. 185-274

UNITED STATES OF AMERICA,
Libelant,
—against—
ISTHMIAN STEAMSHIP COMPANY,
Respondent.

OPINION—August 9, 1955

*Dimock, D. J.*

Libelant in A. 185-33, Isthmian Steamship Company, excepts to certain articles of the answer and seeks a decree pro confesso. Respondent in the same action, the United States of America, moves, pursuant to Rule 13 of the Admiralty Rules of this court, for an order consolidating the two suits which are captioned above. Herein-[fol. 18] after I will refer to A. 185-33 as "Isthmian suit" and to A. 185-274 as "the government's suit".

Isthmian's suit, commenced by libel filed on March 29, 1955, is brought to recover from the government the sum of $115,203.76 alleged to be the unpaid balance of freight due Isthmian from the government for Isthmian's carriage of goods owned by a government agency under a government bill of lading on Isthmian's vessel, the *Steel Worker*, within two years before the date on which the libel was filed. The government's answer admits that it "became obligated to" Isthmian for the freight but alleges, in

Articles 5 and 13, that payment of the sum was made on June 3, 1953 by the "application and set-off" of a sum identical with the one here claimed by Ithmian.

The government's suit is brought to recover from Isthmian the sum of $115,203.76 alleged to be unpaid, due and owing the government as additional hire under a bareboat charter party, dated as of April 29, 1946, for the use by Ithmian of eight identified government-owned vessels during the period from May 1, 1946 to July 31, 1948. The *Steel Worker* was not one of the eight chartered vessels.

The amount claimed by the government as due and owing in its suit against Isthmian is the same bareboat charter hire the alleged set-off of which is set up as the government's defense of payment in Isthmian's suit against the government.

Isthmian excepts to Articles 6 through 13 and to portions of Articles 4 and 5 of the government's answer. Articles 6 through 13 labeled "A Separate and Complete [fol. 19] Defense", contain the same allegations which are the basis of the government's suit and the additional allegation of satisfaction of Isthmian's claim by the government's setoff of the sum which is the subject of the government's suit. The portions of Articles 4 and 5 to which Isthmian excepts deny Isthmian's allegations that the sum for which it is suing has not been paid. The only basis for these denials is the matter set up in the government's separate defense.

Isthmian says that Articles 6 through 13 amount, in substance, to a claim for set-off and argues that since the sum sought to be set-off against its claim arises out of an alleged transaction which is wholly different from the one which is the subject of Isthmian's suit the attempt to set-off is improper. I am clear that if the government's separate defense is a set-off Isthmian's exceptions must be sustained. In admiralty a set-off is not cognizable except in so far as it relates to the transaction which is the subject of the libel. The *Jane Palmer* D. C. S. D. N. Y., 270 F. 609; *United Transp. & L. Co.* v. *New York & B. Transp. Line*, D. C. S. D. N. Y., 180 F. 902, aff'd 185 F. 386; *The Yankee*, D. C. E. D. N. Y., 37 F. Supp. 512; *Susquehanna S. S. Co.* v. *A. O. Anderson & Co.*, 4 Cir.,

6 F. 2d 858; *Hildebrand* v. *Geneva Mill Co.*, D. C. M. D. Ala. S. D., 32 F. 2d 343. Here the transaction upon which Isthmian's suit is based and the one upon which the government's separate defense is based are different in kind and distant in time from one another. The Government, however, argues that its separate defense is one of payment rather than one of set-off. It is quite true that the government alleges that on June 3, 1953, by setting off the claim the facts of which are alleged in its separate defense, it "paid" Isthmian's claim. The trouble with [fol. 20] this is that Isthmian denies the allegation. In fact the government's suit was instituted, pursuant to 31 U. S. C. § 227, to establish its right to this amount. Indeed, the fact of non-payment of this identical claim was expressly asserted by (18) the government in supporting the government's successful motion to dismiss Isthmian's suit in the Court of Claims to recover this balance of freight. *Isthmian Steamship Company* v. *United States*, 130 F. Supp. 336. The government either paid the freight to Isthmian or it did not. If it paid the freight it did so by cancelling its claim against Isthmian for charter hire. Suit for the charter hire is completely inconsistent with any such cancellation. See *Climactic Rainwear Co.* v. *United States*, Ct. Cl., 88 F. Supp. 415.

The effect of what has been said is that Isthmian's exceptions must be sustained. In turn, the effect of this determination is that the government's motion for consolidation must be denied. Rule 13 of the Admiralty Rules of this court provides:

> "When various suits are pending, all resting upon the same matter of right or defense, although there be no common interest between the parties, the court may consolidate or compel said suits to be tried together, and enter a single decree or decrees in each cause."

While the government's separate defense to Isthmian's suit was part of its answer it could at least have been argued that the identity of the government's defense in one suit with its claim in the other might justify consolidation. The sustention of Isthmian's exceptions has eliminated even this argument.

[fol. 21] In opposition to the branch of Isthmian's motion which seeks a decree pro confesso, or, as Isthmian says in its moving papers, "judgment on the pleadings", the government says only that it knows of no authority in admiralty for the grant of "judgment on the pleadings". It does not deny Isthmian's repeated assertions that "Respondent (the Government) admits that libelant (Isthmian) is entitled to the freight except for the alleged 'payment' by set-off". Nor has the government even requested that, in the event that Isthmian's exceptions are sustained, it be given leave to answer further.

The government is correct in its assertion that in admiralty there is no authority for judgment on the pleadings, but I do not believe that justice will be served by holding Isthmian rigidly to its misnomer. Under General Admiralty Rules 27 and 29 the matter of exception may be taken pro confesso against the government to the full purport and effect of the articles of the libel left unanswered. These articles embody Isthmian's whole claim. The government concedes that the answer (19) admits that the government was originally indebted to Isthmian for the amount claimed.

Isthmian's exceptions are sustained and its application for a decree granting the relief sought by it in A. 185-33 is granted. The government's motion for consolidation is denied.

Dated: August 9, 1955

E. J. DIMOCK
United States District Judge

[fol. 22] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,

—against—

UNITED STATES OF AMERICA,
Respondent.

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A. 185-274

UNITED STATES OF AMERICA,
Libelant,

—against—

ISTHMIAN STEAMSHIP COMPANY,
Respondent.

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ORDER DENYING MOTION TO CONSOLIDATE—Dated August 31, 1955

The United States of America, having moved for an order, pursuant to Rule 13 of the Admiralty Rules of this Court, consolidating the above captioned causes for trial, and the Court having filed its opinion, dated August 9, 1955, it is

ORDERED that said motion be and is hereby denied.

Dated, New York, N. Y.,
August 31, 1955.

E. J. DIMOCK
U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Dated September 22, 1955

A libel having been filed herein on March 29, 1955 pursuant to the Suits in Admiralty Act, 46 U. S. C. 741 et seq. 41 Stat. 525 et seq., for the sum of $115,203.76 with such interest as may be allowable thereon, and the libelant having excepted to the answer of the respondent, and having prayed that the matter excepted to be stricken from the answer, and that libelant be given judgment on the pleadings, and the Court having filed its opinion, dated August 9, 1955, it is

ORDERED that the said exceptions be and are hereby sustained, and that a decree in favor of the libelant against the respondent as prayed for in the libel be and is hereby granted, and it is

ORDERED, ADJUDGED AND DECREED that Isthmian Steamship Company, libelant, recover of and from the United States of America, respondent, the sum of $115,203.76, with interest at four percent (4%) per annum from March 29, 1955, amounting to the sum of $2,070.51, together with costs in the sum of $40.00, as taxed, amounting in all to the sum of $117,314.27, with interest at four percent (4%) per annum on the said total sum of $117,314.27, from the date of this decree until paid.

Dated, New York, N. Y.,
September 22, 1955.

s/ E. J. DIMOCK
U. S. D. J.

[fol. 24] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,

—against—

UNITED STATES OF AMERICA,
Respondent.

NOTICE OF APPEAL—Dated December 19, 1955

*Sirs:*

PLEASE TAKE NOTICE that the respondent hereby appeals to the United States Court of Appeals for the Second Circuit from the final decree dated September 22, 1955 and entered herein on September 26, 1955 in favor of the libelant and against the respondent for the sum of [fol. 25] $117,314.27, and respondent appeals from the whole and each and every part of said decree.

Dated: New York, N. Y.
December 19, 1955

Yours, etc.,

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To:

KIBLIN, CAMPBELL & KEATING, Esqs.
Proctors for Libelant
120 Broadway
New York, N. Y.

[fol. 26] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

No. 4—October Term, 1957.

Argued November 6, 1957
Docket No. 24415

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ISTHMIAN STEAMSHIP COMPANY,
*Libelant-Appellee,*

—v.—

UNITED STATES OF AMERICA,
*Respondent-Appellant.*

---

Before:

SWAN, MEDINA and WATERMAN,
*Circuit Judges.*

---

Appeal from a decree of the United States District Court for the Southern District of New York, in admiralty. Edward J. Dimock, *Judge*. Opinion below not reported. Affirmed.

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KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Clement C. Rinehart and Walter P. Hickey, New York, N. Y., of Counsel), *for libelant-appellee.*

[fol. 27] GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y., Paul A. Sweeney, Washington, D. C., Benjamin H. Berman, New York, N. Y., and Herman Marcuse, Washington, D. C., Attorneys, Department of Justice (Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., of Counsel), *for respondent-appellant.*

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OPINION—Decided May 6, 1958

MEDINA, *Circuit Judge:*

This appeal involves the same questions as were considered in *Grace Line, Inc.* v. *United States,* our opinion in which case is filed herewith. In 1946 Isthmian Steamship Company, appellee, used eight vessels chartered to it on a bareboat basis by the United States through the War Shipping Administration. As a result of Isthmian's use of these vessels for the period from May 1, 1946 to July 31, 1948, the United States claimed $115,203.76 as additional charter hire, which Isthmian refused to pay. When, after carrying certain cargo for the United States in 1953, Isthmian submitted a bill for $116,511.44, the United States withheld the amount allegedly due as additional charter hire. Isthmian thereupon filed the libel below to recover its freight for the 1953 shipments.

Isthmian's libel did not refer to its alleged indebtedness to the United States arising out of the 1946-1948 chartering of the vessels. The government's answer alleged that Isthmian was indebted to the United States because of the earlier transaction between the parties, but Isthmian's exception to this answer was sustained on the ground that the admiralty court had no jurisdiction [fol. 28] over the set-off not related to the subject of the libel, and a decree *pro confesso* followed.

For the reasons stated in our opinion in *Grace Line, Inc.* v. *United States,* the decree of the court below is

Affirmed.

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WATERMAN, *Circuit Judge* (concurring):

I concur in the result. See my separate concurring opinion in *Grace Line, Inc.* v. *United States.*

Involved in this case is an added issue relative to the jurisdiction of the court below because of a possible time bar period. Lest it be thought that this issue was not considered by us, I would add that the pleadings disclose that the district court and this court have jurisdiction.

[fol. 29] IN UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Present:

HON. THOMAS W. SWAN
HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
*Circuit Judges.*

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ISTHMIAN STEAMSHIP COMPANY,
Libelant-Appellee

v.

UNITED STATES OF AMERICA,
Respondent-Appellant

---

Appeal from the United States District Court for the Southern District of New York.

JUDGMENT—May 6, 1958

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

[fol. 30] • • •

[fol. 31] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 32] SUPREME COURT OF THE UNITED STATES

(Title omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

August 19, 1958

JOHN M. HARLAN
*Associate Justice of the Supreme Court of the United States.*

Dated this 30th day of July, 1958.

[fol. 33] • • •

[fol. 34] SUPREME COURT OF THE UNITED STATES

No. 285—October Term, 1958

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UNITED STATES OF AMERICA,
Petitioner,

vs.

ISTHMIAN STEAMSHIP COMPANY,

---

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958. 486001 576

No. — 285

# In the Supreme Court of the United States

OCTOBER TERM, 1958

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UNITED STATES OF AMERICA, PETITIONER,

*v.*

ISTHMIAN STEAMSHIP COMPANY

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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J. LEE RANKIN,
*Solicitor General,*
GEORGE COCHRAN DOUB,
*Assistant Attorney General,*
SAMUEL D. SLADE,
HERMAN MARCUSE,
*Attorneys,*
*Department of Justice,*
*Washington 25, D. C.*

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Cases—Continued



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# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

UNITED STATES OF AMERICA, PETITIONER,

*v.*

ISTHMIAN STEAMSHIP COMPANY

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on May 6, 1958.

### OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of New York, dated August 9, 1955 (R. 17a-21a) [1] is reported at 134 F. Supp. 854. The opinions of the Court of Appeals in this case (Appendix, *infra*, pp. 18-19) and in the related case of *Grace Line, Inc.* v. *United States* [2] (Appendix, *infra*, pp. 21-31) are not yet reported.

[1] "R." refers to the appendix to the Government's Court of Appeals' brief, filed in this Court pursuant to Rule 21(3).

[2] The opinion in the instant case incorporates by reference the reasons stated in *Grace Line, Inc.* v. *United States*. We do not seek review of the decision in the *Grace Line* case for the reasons noted *infra* (p. 6, note 3).

## JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1958 (Appendix, *infra*, p. 20). The time within which to file a petition for a writ of certiorari was extended to and including August 19, 1958 by order of Mr. Justice Harlan, dated July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Government's long-standing power under 31 U.S.C. 71 to effectuate administrative recoupment, *i.e.* to withhold funds which it admittedly owes a claimant and to apply them toward the satisfaction of an independent debt which the latter owes to the United States, is inoperative in the field of admiralty.

2. Whether a court, awarding interest in a case arising under the Suits in Admiralty Act, may make an award exceeding the 4 per centum statutory limit by allowing interest on the interest which accrued between the filing of the suit and the entry of the final decree.

## STATUTES INVOLVED

1. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. 71, provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

2. Section 3 of the Suits in Admiralty Act, 41 Stat. 526, 46 U.S.C. 743, provides in pertinent part:

> * * * [W]hen the decree is for a money judgment [against the United States], interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. * * *

3. Section 5 of the Suits in Admiralty Act, 41 Stat. 526, as amended, 46 U.S.C. 745, provides in pertinent part:

> * * * [N]o interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest.

## STATEMENT

1. *The facts:*

In 1946, the United States chartered eight vessels to the Isthmian Steamship Company ("Isthmian") on a bare boat basis (R. 5a-6a). The charter parties contained a clause providing that if Isthmian's net voyage profits should exceed 10 per centum per annum of the capital invested by the charterer, Isthmian would pay the United States a part of such excess as additional charter hire (R. 7a-8a). The United States determined that the additional charter hire due it under this clause, for the period from May 1, 1946 to July 31, 1948, amounted to $115,203.76 (R. 9a).

In 1953, Isthmian's vessel *S.S. Steelworker*—not one of the vessels involved in the 1946-1948 bare boat charters—carried certain military cargo for the United States. When Isthmian submitted a freight bill for $116,511.44 (R. 4a), the United States, on June 3, 1953, acting pursuant to 31 U.S.C. 71 (*supra*, p. 2), with-

held the sum of $115,203.76 from that bill, and applied it to the payment of Isthmian's indebtedness to the United States for additional charter hire (R. 9a).

2. *The litigation:*

*a. In the Court of Claims.* Isthmian first sued in the Court of Claims to recover the amount withheld. Its complaint alleged that it had carried cargo on the *S.S. Steelworker* for the Military Sea Transportation Service; that it had submitted a freight bill for its services in the amount of $116,511.44; that the United States did not deny that this sum was owing for transportation of the cargo; that, nevertheless, the Military Sea Transportation Service had drawn a check in the sum of $115,203.76 to the Maritime Administration to cover an alleged claim for additional charter hire, the validity of which Isthmian denied. The United States moved to dismiss the complaint on the ground that the subject matter of the controversy was either Isthmian's claim for maritime freight or the Government's claim for additional charter hire, and that in either event the district courts had exclusive jurisdiction under the Suits in Admiralty Act. The Court of Claims agreed and granted the motion. *Isthmian Steamship Co.* v. *United States,* 131 C. Cls. 472.

*b. In the District Court.* Shortly before the dismissal of its complaint in the Court of Claims, Isthmian filed a libel in the United States District Court for the Southern District of New York alleging that the United States owed Isthmian freight charges for certain cargo transported on the *S.S. Steelworker;* that Isthmian had presented a bill for $116,511.44; and that the United States had failed and refused to pay $115,203.76 due and payable under the bill of lading (R.

3a-4a). The libel made no reference to the fact that the Government had withheld the $115,203.76 in order to satisfy its claim in that amount for additional charter hire.

The answer of the United States (R. 5a-9a) admitted that Isthmian had submitted a claim for maritime freight for $116,511.44, denied that the Government had failed and refused to pay $115,203.76, and alleged that this sum had been paid by applying it to Isthmian's indebtedness to the United States for additional charter hire in the same amount. Shortly before answer, the Government had filed in the same court a cross-libel against Isthmian for the recovery of $115,203.76 additional charter hire. The day after the filing of its answer, the United States moved to consolidate Isthmian's libel with the Government's cross-libel on the ground that the question of the validity of the Government's claim for additional charter hire was fully dispositive of both libels (R. 10a-13a).

Isthmian excepted to the answer on the ground that the defensive matter pleaded therein did not arise from the transaction for which the libel was filed. It moved that the excepted matter be stricken from the answer and that Isthmian be given judgment on the pleadings (R. 14a-16a).

The District Court held that the defense of withholding and applying did not constitute a plea of payment, but that it constituted a claim of set-off arising from a discrete transaction. Holding further that admiralty had no jurisdiction over such a set-off, it struck the Government's defense and awarded judgment to Isthmian. The court also denied the motion to consolidate because, after the Government's defense had been

stricken, Isthmian's libel and the Government's cross-libel no longer had any common issue (R. 17a-23a).

The final decree awarded Isthmian the sum of $115,203.76, interest at 4 per centum per annum from the time of the filing of the complaint to the day of decree, amounting to $2,070.51, and $40 costs, totalling $117,314.27 It awarded further interest on that total, at the rate of 4 per centum, from the date of the decree until paid. The interest which accrued during the pendency of the litigation in the District Court ($2,070.51) is drawing interest at the rate of 4 per centum per annum; in other words, it has been compounded.

*c. In the Court of Appeals.* The Court of Appeals affirmed the decision of the District Court on the authority of its ruling in *Grace Line, Inc.* v. *United States,* decided on the same day (Appendix, *infra,* pp. 21-31).[3]

In *Grace Line,* the Court of Appeals held that the Government's defense of withholding and applying did not constitute a plea of payment but one of set-off or counterclaim. Such set-off, in its view, was not cognizable in admiralty because it did not arise from the transaction on which the libel was based.

Dealing with the Government's argument that its disputed claim for additional charter hire constituted the actual subject matter of the instant controversy,

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[3] We do not petition for a writ of certiorari in *Grace Line* because that decision rests on the additional ground that the statute of limitations of Section 3(6) of the Carriage of Goods by Sea Act and a limitations clause contained in the bill of lading had both run against the claim of the United States (Appendix, *infra,* pp. 24-27). While we believe that that ruling is not correct, it does not appear at the present time that the issue of limitations is of sufficient importance to warrant review by this Court. We have been advised by the General Accounting Office that it has devised procedures designed to insure the timely deduction of damage claims arising out of ocean transportation.

the court said that no "amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure" (Appendix, *infra*, p. 29). It concluded that the proper procedure in this type of litigation is to enter a decree *pro confesso* for the libelant. The Government, the court said, may then pursue a remedy under 31 U.S.C. 227, *i.e.*, the Comptroller General can withhold payment of the amount awarded by the decree and cause a new action to be instituted against libelant (Appendix, *infra*, pp. 27-28).

The Court of Appeals also held that Section 3 of the Suits in Admiralty Act, which provides that interest at the rate of not to exceed 4 per centum per annum may be awarded to "run as ordered by the court", authorized the District Court to exceed the 4 per centum rate by the compounding of interest (Appendix, *infra*, pp. 30-31).

## REASONS FOR GRANTING THE WRIT

If Isthmian were a rail carrier, rather than a water carrier, and the circumstances were otherwise identical, it is plain, under this Court's decision of only last term in *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253, that (1) the act of the United States in withholding and applying funds admittedly due Isthmian for transportation services in order to satisfy a pre-existing claim of the United States would place upon Isthmian the burden of instituting suit, and (2) that the only issue in that suit would be the validity of the Government's disputed claim against Isthmian. The consequence of the decision below is that when the claimant is an ocean carrier

(though not otherwise) the availability of administrative recoupment is destroyed. Isthmian is thus held entitled to a decree *pro confesso* awarding the amount which the Government had withheld, albeit there has been no adjudication of the merits of the Government's withholding. The only matter which is actually in dispute is left untouched. And the court concludes that the remedy is for the Government to institute a new law suit.

We submit that the court below misconceived the real nature of the case before it; that admiralty procedures certainly do not require the meaningless circuity of action which this decision entails; and that there is no sound basis, either from the standpoint of substance or procedure, for excepting maritime claims from the operation of the Government's established power to withhold and apply.

To the extent that the decision below approves a departure from the statutory 4 per centum limit on the rate of interest which may be awarded in cases arising under the Suits in Admiralty Act, it disregards the settled rule that statutes authorizing the award of interest against the United States are to be narrowly construed and that they are deemed to refer to simple interest only.

1. The Court of Appeals erred in failing to recognize, *first*, that the Government's defense of withholding and applying is in the nature of a plea of payment, which is, of course, within the jurisdiction of the admiralty courts; and *second*, that in an action or libel designed to challenge the exercise by the Government of its power to withhold and apply, the Government's disputed claim is the real subject matter of the litigation.

a. *The legal import of the Government's defense was payment, not set-off.* Section 305 of the Budget and Accounting Act, 1921, 31 U. S. C. 71, *supra*, p. 2, which dates back to the Act of March 3, 1817, 3 Stat. 366, and to R. S. 236, provides that all claims and demands by or against the Government shall be settled and adjusted in the General Accounting Office. It has been established for nearly a century that this power to "settle and adjust" includes the authority, if not the duty, "to set off one debt against another, when a claimant is both debtor and creditor" *McKnight* v. *United States*, 13 C. Cls. 292, 306, affirmed, 98 U.S. 179, 186. The effect of the exercise by the Government of its power under 31 U. S. C. 71 is "to strike a balance between the debts and credits of the government." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240. In short, where the United States withholds payment on a debt owed by it and applies it to a valid claim of its own, the indebtedness of the claimant to the United States is discharged, and, conversely, the substance of his claim against the United States is destroyed. *McKnight* v. *United States*, 98 U.S. 179; *United States* v. *American Surety Co.*, 158 F. 2d 12, 13 (C.A. 5); *Sanders* v. *Commissioner of Internal Revenue*, 225 F. 2d 629, 637 (C.A. 10), certiorari denied, 350 U.S. 967; *American Railway Express Co.* v. *United States*, 62 C. Cls. 615, 636, certiorari denied, 273 U.S. 750; *Morgan* v. *United States*, 131 F. Supp. 783 (S.D. N.Y.).

The defense of withholding and applying thus is in the nature of a plea of payment.[4] Concretely, in this

[4] On the historic relationship between the pleas of defense and set-off, see Waterman, *A Treatise on the Law of Set-Off, Recoupment, and Counterclaim* (1869), Section 560.

case it explains the Government's denial of the allegation in the complaint that the United States had failed and refused to pay the $115,203.76 in dispute (*supra*, p. 5).

b. *In an action seeking judicial review of the Government's act of recoupment, the validity of the Government's contested claim, not the plaintiff's uncontested claim, is the real subject matter of the litigation.* To be sure, the debt owed by the Government is not discharged by the mere *ipse dixit* of the Comptroller General that the claimant, himself, is indebted to the United States. The courts have full power to review the Comptroller's action and to determine whether the Government had a valid claim, for only in that event has the Government's indebtedness been discharged, *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240.

The true import of respondent's complaint is that the Government improperly withheld payment because it does not in fact have a valid claim for additional charter hire. The essential nature of the action cannot be concealed by the fact that respondent limited itself to a recital of its claim for maritime freight and omitted all reference to the Government's withholding action (which, significantly, had been detailed in respondent's prior complaint in the Court of Claims).[5]

[5] These considerations, of course, are not limited to the Government's plea of withholding and applying. It is generally recognized that where the defendant admits all the basic allegations of the complaint and sets up an affirmative defense, the issue which emanates from the answer is the subject matter of the litigation, and that a litigant may not curtail his opponent's defense by artfully framing his complaint so as to make *bona fide* defenses going directly to the heart of the controversy assume the appearance of a set-off or counterclaim unrelated to the subject matter of the action. *Eastern Transportation Co.* v. *Blue Ridge Coal Corp.*; 159 F. 2d 642, 643 (C.A. 2); *United States* v. *West*, 8 App. D. C. 59, 64; *Parmelee*

In holding contrariwise that it was bound by the formal allegations of the complaint, the court below disregarded the teaching of this Court in *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253, 263, which held that in actions of this type the courts are concerned with substance, not form, and that, although the complaint may set forth only the claimant's uncontested claim, the true dispute between the parties—the lawfulness of the claim on which the withholding is based—must be determined. To the same effect, see *Alcoa S. S. Co.* v. *United States*, 338 U.S. 421, 422, and *Wabash Ry. Co.* v. *United States*, 59 C. Cls. 322, 327, affirmed *sub nom. United States* v. *St. Louis, etc., Ry. Co.*, 270 U.S. 1.[6]

2. Even if we assume *arguendo* that the Government's defense constituted a set-off or counterclaim not arising from the same transaction upon which the libel was based, the court below had jurisdiction to entertain the defense. Giving no weight to the consideration that unlimited set-off is permitted under the Federal Rules of Civil Procedure, the court below declares that limiting the assertion of set-offs in admiralty "has stood the test of time" (Appendix *infra*, p. 29). Its approach is in striking contrast to this Court's recent

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v. *Chicago Eye Shield Co.*, 157 F. 2d 582, 586 (C.A. 8); *Lesnik* v. *Public Industrial Corporation*, 144 F. 2d 968, 975 (C.A. 2); *Cleveland Engineering Co.* v. *Galion D. M. Truck Co.*, 243 Fed. 405, 407 (N.D. Ohio).

[6] Similarly, where the United States withholds payments of a pension on the basis of Government claims against the pensioner, the courts have had no difficulty in reviewing the propriety of the withholding, i.e., in examining the validity of the Government's claim, despite the fact that they lack jurisdiction over pension claims. 28 U. S. C. 1346(d), 1501. *Reynolds* v. *United States*, 292 U.S. 443; *Price* v. *United States*, 121 C. Cls. 664, certiorari denied, 344 U.S. 911; cf. *McElhany* v. *United States*, 101 C. Cls. 286, 291-292.

admonition that "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices," *British Transport Commission* v. *United States*, 354 U.S. 129, 139.[7]

The decisions limiting set-offs and counterclaims in admiralty to those arising from the same transaction which constitutes the subject matter of the libel rely primarily on three considerations, none of which has vitality. First, there is the policy of protecting seamen's wage claims against set-off.[8] This has been achieved by statute ever since 1872.[9] Second, there is the desire to prevent a complicated trial from becoming utterly unmanageable by the injection of extraneous issues.[10] This may be accomplished by ordering separate trials in appropriate cases, as is commonly done under Rule 42(b), Federal Rules of Civil Procedure.[11] Third, some cases, notably *United Transportation & L. Co.* v. *New York & Baltimore Tr. Line*, 185 Fed. 386 (C.A. 2), rest upon a very restricted view of the scope of admiralty jurisdiction. This view has never been shared by this Court (*Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U.S. 117; *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684; *Archawski* v. *Hanioti*, 350 U.S. 532), and the Second

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[7] See, also, *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 216, "It [admiralty] looks to a complete and just disposition of a many cornered controversy. * * *"

[8] See, *e.g.*, *Willard* v. *Dorr*, 3 Mason 161, 171-172, 29 Fed. Cas. 1277, 1280, No. 17680 (C.C.D. Mass.); *Bains* v. *The James & Catherine*, Baldw., 544, 2 Fed. Cas. 410, No. 756 (C.C.D. Pa.).

[9] Cf. *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 781.

[10] Cf. *Powell* v. *United States*, 300 U.S. 276, 289-290.

[11] This consideration, of course, is not applicable where, as here, the claim upon which the libel is based is undisputed and the sole controversy centers on the justification of the withholding.

Circuit itself seemed to have abandoned it. *Sword Line* v. *United States*, 230 F. 2d 75, affirmed, *per curiam*, 351 U.S. 976.

The early cases limiting set-off in admiralty also took the position that in this, as in many other aspects, admiralty followed equity.[12] Equity, however, has permitted independent set-offs and counterclaims since (if not before) the promulgation of the Equity Rules of 1912. Rule 30, 226 U.S. 657.[13] Reassertion in this case of the view that set-off in admiralty is subject to rigorous restrictions is an anachronism.

Moreover, it is peculiarly inappropriate to apply such restrictions here. Prior to the enactment in 1920 of the Suits in Admiralty Act, the Court of Claims and (in cases involving less than $10,000) the district courts had jurisdiction over claims arising under maritime contracts like the one at bar. In such proceedings, the United States had unlimited power of set-off under the equivalents of the present 28 U. S. C. 1346(c) and 1503. It is hardly to be assumed that when the Suits in Admiralty Act transferred most maritime claims against the United States to the exclusive jurisdiction of the admiralty courts,[14] Congress sought to curtail the Government's power to withhold and apply.[15]

3. In holding that respondent was entitled to interest

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[12] Cf. *The Dove*, 91 U.S. 381, 385; *Willard* v. *Dorr*, 3 Mason 161, 171-172, 29 Fed. Cas. 1277, 1280, No. 17680 (C.C.D. Mass.); *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, 116 Fed. 857, 858 (C.A. 1).

[13] The scope of Equity Rule 30 has been clarified and somewhat expanded by Rule 13, Federal Rules of Civil Procedure. See 3 Moore, *Federal Practice* (Second Edition), Section 13.03.

[14] *Johnson* v. *Emergency Fleet Corp.*, 280 U.S. 320.

[15] The mere fact that the Suits in Admiralty Act does not contain an express equivalent to 28 U. S. C. 1346(c) and 1503 certainly does not foreclose the right of set-off. The Government's power to with-

on the interest which accrued while the case was pending in the District Court, the decision below not only makes an award in excess of the 4 per centum statutory limit, but conflicts with consistent rulings that compound interest may not be awarded against the United States in the absence of specific statutory authorization. Immunity from payment of interest (except in just compensation cases) is an incident of the sovereignty of the United States which can be waived only by Congress. *United States* v. *N. Y. Rayon Co.*, 329 U.S. 654, 660-661; *United States* v. *Goltra*, 312 U.S. 203, 207.[15a] The pertinent statutory provisions (Sections 3 and 5 of the Suits in Admiralty Act, *supra*, pp. 2-3) authorize the award of "interest at the rate of 4 per centum per annum until satisfied" and at no higher rate unless permitted by contract. They also provide that "[i]nterest shall run as ordered by the court" but not from a time prior to the filing of the libel. The court below apparently took the position that the latter clause authorized the District Court to compound interest. The compounding of interest, however, is never favored, not even where private persons are con-

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hold and apply does not flow from procedural provisions such as 28 U. S. C. 1346(c) and 1503, permitting set-off, but from 31 U. S. C. 71, which is of a substantive nature. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240; *Eastern Transportation Co.* v. *United States*, 159 F. 2d 349, 352 (C.A. 2); *Malman* v. *United States*, 207 F. 2d 597 (C.A. 2). Admiralty can fashion the procedural means for enforcing any substantive law it has been called upon to administer. *The Epsilon*, 6 Ben. 378, 389, 8 Fed. Cas. 744, 748, No. 4506 (E.D. N.Y.); *The Hudson*, 15 Fed. 162 (S.D. N.Y.); *Dowling* v. *Isthmian Steamship Corp.*, 184 F. 2d 758, 778 (C.A. 3). And it may not prescribe a rule abridging or modifying a substantive right created by Congress. 28 U.S.C. 2073. Cf. Appendix, *infra*, p. 28.

[15a] Congress has not ordinarily allowed prejudgment interest at all (see 28 U.S.C. 2411, 2516; 31 U.S.C., Supp. V, 724a; 46 U.S.C. 782), no less compound interest.

cerned.[16] Consequently, it has been held consistently that statutes authorizing the award of interest against the United States refer to simple interest only and do not warrant compound interest. *Cherokee Nation* v. *United States*, 270 U.S. 476, 490-491; *Ute Indians* v. *United States*, 45 C. Cls. 440, 470; *Menominee Tribe of Indians* v. *United States*, 97 C. Cls. 158, 162.[17]

4. We believe that both questions raised by this petition are of substantial importance.

Certainly the question whether the Government's traditional power to withhold and apply is inoperative in the field of admiralty is one of practical importance in the day-to-day operations of the Government. The decision below cannot fail to have serious impact upon the Government's methods of paying its bills and collecting overcharges. The business transactions of the United States with shipping companies are, of course, numerous and substantial in volume. In some forty cases now pending in the admiralty courts, the United States has interposed a defense based upon an act of withholding and applying. This takes no account of the controversies, greater in number, in which the Government has exercised its right of administrative recoupment but in which suit has not yet been brought.

The matter is of moment from the standpoint of sound judicial administration as well as from the standpoint of litigants. The necessary consequence of the

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[16] *Cherokee Nation* v. *United States*, 270 U.S. 476, 490; *In re Realty Associates Securities Corporation*, 163 F. 2d 387, 392 (C.A. 2), certiorari denied, 332 U.S. 836.

[17] *National Bulk Carriers* v. *United States*, 169 F. 2d 943, 951 (C.A. 3), cited in the opinion below, deals with interest as an element of just compensation for the taking of property, a situation in which specific statutory authority for the award of interest is not deemed required. See *Jacobs* v. *United States*, 290 U.S. 13, 16.

decision below is circuity of action and a multiplication of law suits. The adjustment of competing demands in a single suit is generally favored and encouraged.[18] It ought to be particularly encouraged where, as here, there is actually only one claim which is controversial.

The question whether interest which accrued during the pendency of litigation in the district court may itself draw interest from the time of the final decree is likewise of broad importance. It is not limited to cases in which the Government has exercised its power to withhold and apply, but presents itself whenever a money judgment is entered against the United States in an admiralty court.

While in the average case the amount involved may not be large, the cumulative effect of the compounding of interest will result in the imposition of a substantial burden. The instant case and the *Grace Line* case are not the only instances in which compound interest has been awarded. The practice is now being followed in almost every case decided in the Southern District of New York where a very large percentage of the Government's admiralty litigation is concentrated.

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[18] See *Barry* v. *United States*, 229 U.S. 47, 53; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.*, 152 U.S. 596, 615-616; *Cherry Cotton Mills, Inc.* v. *United States*, 103 C. Cls. 243, 251, affirmed, 327 U.S. 536; *Pamelee* v. *Chicago Eye Shield Co.*, 157 F. 2d 582, 587-588 (C.A. 8); *Thompson* v. *United States*, 250 F. 2d 43 (C.A. 4).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
*Solicitor General.*
GEORGE COCHRAN DOUB,
*Assistant Attorney General.*
SAMUEL D. SLADE,
HERMAN MARCUSE,
*Attorneys.*

AUGUST 1958.

APPENDIX

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 4—October Term, 1957.

(Argued November 6, 1957 Decided May 6, 1958.)

Docket No. 24415

ISTHMIAN STEAMSHIP COMPANY, LIBELANT-APPELLEE,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT.

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Before: SWAN, MEDINA and WATERMAN, *Circuit Judges*

Appeal from a decree of the United States District Court for the Southern District of New York, in admiralty. Edward J. Dimock, *Judge*. Opinion below not reported. Affirmed.

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Clement C. Rinehart and Walter P. Hickey, New York, N. Y., of Counsel), *for libelant-appellee.*

GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y., Paul A. Sweeney, Washington, D. C.; Benjamin H. Berman, New York, N. Y., and Herman Marcuse, Washington, D. C., Attorneys, Department of Justice (Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., of Counsel), *for respondent-appellant.*

MEDINA, *Circuit Judge*:

This appeal involves the same questions as were considered in *Grace Line, Inc.* v. *United States*, our opinion

in which case is filed herewith. In 1946 Isthmian Steamship Company, appellee, used eight vessels chartered to it on a bareboat basis by the United States through the War Shipping Administration. As a result of Isthmian's use of these vessels for the period from May 1, 1946 to July 31, 1948, the United States claimed $115,203.76 as additional charter hire, which Isthmian refused to pay. When, after carrying certain cargo for the United States in 1953, Isthmian submitted a bill for $116,511.44, the United States withheld the amount allegedly due as additional charter hire. Isthmian thereupon filed the libel below to recover its freight for the 1953 shipments.

Isthmian's libel did not refer to its alleged indebtedness to the United States arising out of the 1946-1948 chartering of the vessels. The government's answer alleged that Isthmian was indebted to the United States because of the earlier transaction between the parties, but Isthmian's exception to this answer was sustained on the ground that the admiralty court had no jurisdiction over the set-off not related to the subject of the libel, and a decree *pro confesso* followed.

For the reasons stated in our opinion in *Grace Line, Inc.* v. *United States*, the decree of the court below is

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result. See my separate concurring opinion in *Grace Line, Inc.* v. *United States.*

Involved in this case is an added issue relative to the jurisdiction of the court below because of a possible time bar period. Lest it be thought that this issue was not considered by us, I would add that the pleadings disclose that the district court and this court have jurisdiction.

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May one thousand nine hundred and fifty-eight

Present: HON. THOMAS W. SWAN, HON. HAROLD R. MEDINA, HON. STERRY R. WATERMAN, *Circuit Judges*

ISTHMIAN STEAMSHIP COMPANY, LIBELANT-APPELLEE,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee,

A. DANIEL FUSARO,
*Clerk*

# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 5—October Term, 1957.

(Argued November 6, 1957 Decided May 6, 1958.)

Docket No. 24416

GRACE LINE, INC., LIBELANT-APPELLEE,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT.

Before: SWAN, MEDINA and WATERMAN, *Circuit Judges*.

The United States appeals from a decree of the United States District Court for the Southern District of New York, in admiralty. William B. Herlands, *Judge*. Opinion below reported at 144 F. Supp. 548. Affirmed.

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Walter P. Hickey, L. DeGrove Potter and Clement C. Rinehart, New York, N. Y., of Counsel), *for libelant-appellee*.

GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y., Paul A. Sweeney, Washington, D. C., Benjamin H. Berman, New York, N. Y., and Herman Marcuse, Washington, D. C., Attorneys, Department of Justice (Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., of Counsel), *for respondent-appellant*.

MEDINA, *Circuit Judge*:

In form the decree in admiralty from which the government appeals was entered *pro confesso* on motion of the libelant Grace Line, Inc., based upon exceptions and exceptive allegations addressed to the sufficiency of the answer, which asserted payment of the claim sued upon.

It is alleged in the libel that between December 31, 1954 and February 16, 1955 Grace carried six shipments of ore for the United States for which freight charges in the amount of $10,732.22 became due and payable. The validity of this freight claim is not disputed. But the United States paid only $2,490.75, and the remaining $8,241.47, for which the judgment *pro confesso* was entered, was withheld and applied by the Comptroller General against the freight bill because of damages alleged to have been suffered by the United States in a wholly unrelated series of transactions, during the period from December 14, 1952 to April 6, 1953, in connection with which it is claimed that some of the goods transported by Grace were delivered in a damaged condition and some were lost.

The bills of lading under which the 1952-1953 shipments were made provided that "the Carrier shall be discharged from all liability in respect of * * * every claim whatsoever with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *." The bills also incorporated by reference the Carriage of Goods by Sea Act, 46 U. S. C. § 1301 *et seq.*, which includes a similar one year time bar. No judicial proceedings were instituted by the United States against Grace for the loss of, or damage to, the 1952-1953 shipments within the one year period.

Grace's libel in the court below claimed that freight was due under the 1954-1955 shipments, but made no mention of Grace's earlier transactions with the United

States. The government's answer alleged, by way of set-off or defense, that Grace was indebted to the United States in an amount greater than that claimed in the libel because of its mishandling of the earlier shipments. Grace's exceptions to the sufficiency of this answer were sustained on the grounds: (1) that the government's claim based on the 1952-1953 shipments arose from a transaction unrelated to the libel and thus could not be made the subject of a set-off in an admiralty proceeding; and also (2) that this earlier claim was time-barred.

On this appeal the government urges several grounds for reversal. Its first contention is that the Comptroller General's withholding and applying of funds due a creditor because of the creditor's alleged indebtedness to the United States results in the discharge of "mutual debts" and thus constitutes "payment"; and that an admiralty court must always consider payment as a defense to a libel. The government bases this argument on the provision in 31 U. S. C. § 71 that all claims by or against the United States "shall be settled and adjusted in the General Accounting Office," which it asserts is part of a "comprehensive statutory plan" made up of this and several other statutes, located in different parts of the United States Code,[1] authorizing the withholding of money by the Comptroller General whenever a creditor of the United States is also allegedly indebted to the United States.

The specific issue on this first phase of the case is: what did the Congress mean by 31 U. S. C. §71, which provides: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor,

[1] 5 U. S. C. §46(d) (Supp. III); 5 U. S. C. § 82; 31 U. S. C. § 227; 49 U. S. C. § 66.

shall be settled and adjusted in the General Accounting Office." The question is one of statutory interpretation. We think it merely pricks the surface of the problem to dispose of the case by saying that it is absurd to suppose that the statute was intended to provide the government with a means of keeping stale claims alive indefinitely with respect to those having more or less continuous business relations with the United States.

The semantics of the government approach here is in terms of the defense of "payment." But the underlying thesis must be that the Congress intended to bypass the process of adjudication and provided in lieu thereof a unilateral decision by the Comptroller General. We can find nothing in the statute to warrant any such inference. It is not provided that the withholding shall constitute payment or a discharge of the debt, nor does the general context, nor any word or phrase therein, indicate that the normal processes of adjudication are to be overridden. Indeed, there is no dispute about the right of the government to proceed, as it often does, to reduce its claim to judgment if it can. Moreover, in the view of the Comptroller General,[2] and under the cases,[3] the withholding by the Comptroller General is subject to judical review; and no legislative history has been brought to our attention which supports the contention that administrative action by the Comptroller General in withholding money

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[2] Letter of the Comptroller General of the United States, 1954 U. S. Code Congressional and Administrative News, 2553, 2554.

[3] E.g., *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240. In *Munsey*, where the Supreme Court said that "(t)he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him,'" 332 U.S. at 239, it was considering the situation where the creditor's debt to the United States was not disputed, and it clearly recognized that such was the fact in the case then before it. 332 U.S. at 237, 240.

due to a creditor of the United States makes it unnecessary for the government to prove its claim on the merits, subject to such defenses as may exist in law or in fact, if it is to be applied against a claim of the creditor in settlement thereof. In other words, the attempted set-off must be a legally enforceable claim; and the fact that the Comptroller General has decided the claim in favor of the government *ex parte* by withholding the amount thereof from a payment justly due to a creditor of the United States neither constitutes a payment of and discharge of the debt nor does it stop the running of the applicable Statute of Limitations against the government claim in alleged satisfaction of which the Comptroller General takes this unilateral action. Here the period of limitations had plainly run.[4]

The statutory scheme, such as it is, constitutes no more than a method for co-ordinating the claims and debts of the various government departments and agencies.

The government cites Section 322 of the Transportation Act of 1940, 49 U. S. C. §66, and its application in *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, recently decided by the Supreme Court, as part of the "comprehensive statutory plan" which, it argues, shows that Congress intended that unilateral withholding and applying by the Comptroller General was to constitute payment of a creditor's claim. Consideration of the *Western Pacific* case and 49 U. S. C. §66 as applied therein, however, lends further support to our view, as expressed above, of the extent and effect of the Comptroller General's power to withhold and apply. In that case three railroads had carried shipments of bomb casings filled with napalm gel, which is inflam-

[4] *United States* v. *Seaboard Air Line Ry. Co.*, 4 Cir., 22 F. 2d 113. Compare 31 U. S. C. § 71, with 49 U. S. C. § 66.

mable but not self-igniting, for the United States. The railroads billed the United States at the highest, first-class, rates for "incendiary bombs" and the government paid the bills of two of the railroads as presented. On post-audit, however, the General Accounting Office made deductions from subsequent bills of these two railroads on the grounds that the shipments of napalm gel should have been carried at the lower, fifth-class, rate. The General Accounting Office had acted pursuant to 49 U. S. C. §66 which provides: "Payment for transportation of * * * property for on or behalf of the United States by any common carrier subject to the Interstate Commerce Act * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." The railroads sued in the Court of Claims to recover the sums withheld from their subsequent bills and the government's defense rested on three contentions which went to the merits of the carriers' claim for payment of their subsequent bills. There was no contention that those bills had been "paid" by the withholding.

The statute on which the government relied in *Western Pacific* expressly reserved the right to the United States to deduct any overpayment from any subsequent bills, and this additional time was given to the government solely because the General Accounting Office was required to pay the carrier's bills "upon presentation * * *, prior to audit or settlement * * *." Of course, if the Comptroller General already had the power, under the previously enacted 31 U. S. C. §71 and other statutes authorizing the withholding of money, to "pay" creditor's claims by merely unilater-

ally applying amounts allegedly due the United States, regardless of the nature of, or time limitation on, the goverment's claim, there would be no need for the express reservation in the statute of the right to off-set claims of the United States against carriers' subsequent bills.

Thus it is abundantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States.[5]

Had we agreed with appellant's view that the period of limitations had not run against the government damage claim one might suppose, from the arguments advanced in appellant's brief, that it might be a hardship for the government to pay the Grace claim only to sue for the recovery of the same funds or a part thereof in an action against Grace on the damage claim. But the applicable procedure is clearly set forth in 31 U. S. C. §227. Where a claim, such as the Grace claim for freight charges, is undisputed, the government may let the case proceed to judgment, after which Section 227 in terms provides that "it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt" due to the United States. In the event that the claimant does not acquiesce in the withholding but denies his indebtedness to the United States, Section 227 continues, "then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in procecuting the debt of the United States to final judgment." and "if such debt is not already in suit, it shall be the

[5] See also, *Climatic Rainwear, Inc. v. United States*, 115 Ct. Cl. 520.

duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch."

Appellant also attacks the ruling of Judge Herlands to the effect that appellant's damage claim was unrelated to the claim for the unpaid balance of freight charges alleged in the libel and hence was not within the admiralty jurisdiction, which only extends to set-offs arising out of the same transaction as that on which the libel is based. But this is the well settled admiralty practice, as Supreme Court Admiralty Rule 50 and the Southern and Eastern District Court Admiralty Rules 16 and 17 implicitly require that the set-off arise out of the same transaction. We have repeatedly so held, and as recently as 1951. *Ozanic* v. *United States,* 188 F. 2d 228; *Castner, Curran & Bullitt, Inc.* v *United States,* 5 F. 2d 214; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line,* 185 Fed. 386.

The first point made by appellant on this phase of the case need not long detain us. The substance of this point is that the real controversy between the parties was the damage claim which we have already determined was time barred, and that Grace has limited the government's assertion of this claim "by artificial methods of framing (its) * * * libel." In other words, although Grace has not received the balance due for its freight charges, and asserts in its libel only its claim for the payment of this balance, appellant argues that there is really no dispute about the validity of the claim for freight charges, that this is a purely fictitious issue and that the claim is made in admiralty to foreclose the assertion by appellant of its unrelated damage claim. But there is nothing in this, nor do the cases relied on by appellant so hold. In each of these cases the state

of the pleadings was such that the issues litigated and decided were properly before the court. *Kreitmeyer* v. *Baldwin Drainage District*, 2 F. Supp. 208, 210 (S. D. Fla.), aff'd *sub nom. Florida Nat'd Bank of Jacksonville* v. *Hemphill*, 5 Cir., 68 F. 2d 785; *Eastern Transportation Co.* v. *Blue Ridge Coal Co.*, 2 Cir., 159 F. 2d 642; *Alcoa Steamship* v. *United States*, 80 F. Supp. 158, rev'd, 2 Cir., 175 F. 2d 661, aff'd, 338 U. S. 421.

In the case at bar the subject-matter of the libel was the alleged debt of the United States to Grace arising out of the 1954-1955 shipments, and there is no relationship whatever between this claim asserted in the libel and the claim asserted by the government. No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure.

Appellant's other points are equally unpersuasive. It is idle to cite the numerous general statements in the authorities to the effect that admiralty practice is "non-technical, flexible and plastic," and to emphasize the liberality of the Federal Rules of Civil Procedure and the modern tendency to discard procedural impediments to the administration of justice in the courts. There must be rules to govern such matters as joinder of parties and claims, set-offs, counterclaims and third party practice; and here we have a rule which has stood the test of time and has been applied again and again. We are not at liberty to disregard or overrule it.

Appellant also contends, in this connection, that, even if the admiralty rules prevent the pleading of unrelated set-offs, such a procedural limitation is overcome by the statutory plan which gives the General Accounting Office the "substantive right" to withhold and apply money due a creditor. This argument that the admiralty procedural rule deprives the government of a sub-

stantive right is untenable. The substantive right of the government in the case at bar is its claim for damages resulting from Grace's alleged mishandling of the 1952-1953 shipments. The admiralty rule respecting set-offs is merely part of a congeries of procedural provisions, including the statutes establishing the government's right to withhold and apply, which do not affect the substantive rights of the parties in the case at bar.

Appellant also argues that, even if the strict admiralty rule respecting set-offs is to be applied in this case, the 1952-1953 and 1954-1955 shipments were "merely fragments of a single vast overall transaction" between Grace and the United States. However, the only connection between the shipments during the two separate periods is that both were undertaken by the same shipper, Grace, and, in our view, this alone cannot bring the dealings within the concept of a single transaction. Thus we hold that the court below correctly sustained Grace's exception to the government's pleading of its unrelated set-off.

The final point with which we must deal is the trial court's award of interest at 4% per annum from the date of the decree until the decree is paid, on the composite amount of the sum sought in the libel plus interest at 4% per annum on this amount from the date of filing the libel until the date of the decree. Appellant argues that the court below lacked the power to award this "compound interest." However, Section 3 of the Suits in Admiralty Act, 46 U. S. C. § 743 provides that " * * * when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied * * * " may be included in the decree against the United States, and that " (i)nterest shall run as ordered by the court * * * " There is no showing that the discretion vested in the trial court was abused by the decree

in the case at bar. See *National Bulk Carriers* v. *United States*, 3 Cir., 169 F. 2d 943, 951.

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur with the majority in affirming the judgment of the District Court. I disagree with my colleagues, however, in their characterization of the Government's position with respect to the defense of "payment." I do not understand the Government to argue that the "withholding and applying" procedure which it contends is authorized by 31 U. S. C. § 71 "makes it unnecessary for the Government to prove its claim on the merits * * * " I understand the Government's position to be that the merits of its claim may be adjudicated by a court of competent jurisdiction in an action brought by Grace Line to recover for the alleged wrongful withholding and that the Government does not intend to "by-pass the process of adjudication." Consistent with the position I understand the Government to have taken here, I note that in the case of *Isbrandtsen Company, Inc.* v. *United States*, the United States does not deny that the validity of its claim against Isbrandtsen is raised by Isbrandtsen's libel to recover amounts the Government had withheld and applied upon the claim.

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No. 285



# In the Supreme Court of the United States

OCTOBER TERM, 1958

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UNITED STATES OF AMERICA, PETITIONER

*v.*

ISTHMIAN STEAMSHIP COMPANY

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION**

---

J. LEE RANKIN,
*Solicitor General,*
GEORGE COCHRAN DOUB,
*Assistant Attorney General,*
SAMUEL D. SLADE,
MIRIAM MARCUSE,
*Attorneys,*
*Department of Justice, Washington 25, D. C.*

# In the Supreme Court of the United States

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No. 285

UNITED STATES OF AMERICA, PETITIONER

*v.*

ISTHMIAN STEAMSHIP COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. Respondent's brief in opposition, which seeks support in historic admiralty practice and in common law theories relating to set-off and counterclaim, fails to come to grips with the realities of this case. Moreover, it strikingly fails to take account of the rulings of this Court upon which the petition relies.

The essence of this case is that respondent was seeking money which the Government was withholding and that the Government was withholding, not because it questioned respondent's claim, but solely because of a contested claim which it had against respondent. Whether respondent is entitled to any-

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thing thus depends upon the validity of the Government's claim underlying the act of withholding; there is no other dispute to be litigated.

The decisions of this Court make plain that in these circumstances respondent may not, by artful pleading, convert what is in fact one dispute into two cross-claims.

*a.* This Court has held that, when the Government is both the debtor and creditor of another, it may, under 31 U. S. C. 71, strike a balance. The consequence of doing so is to discharge the Government's debt *pro tanto*. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240; *McKnight* v. *United States*, 13 C. Cls. 292, 306, affirmed, 98 U. S. 179, 186.

*b.* This Court has further held that if the Government withholds and applies money which is admittedly due "X" in order to satisfy a government claim against "X", a suit by "X" is in substance a challenge to the validity of the Government's claim, even though "X's" complaint may set forth only the transaction which gave rise to the Government's obligation. *United States* v. *New York, New Haven & Hartford R. R. Co.*, 355 U. S. 253, 263; *Alcoa S. S. Co.* v. *United States*, 338 U. S. 421, 422; *Reynolds* v. *United States*, 292 U. S. 443; *Wabash Ry. Co.* v. *United States*, 59 C. Cls. 322, 327, affirmed *sub nom. United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1.

*c.* This Court has repeatedly decided, in other contexts as well, that admiralty must discard outmoded forms so that it may completely and justly dispose of a controversy. *British Transport Commission* v.

*United States*, 354 U. S. 129, 139; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216; *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117; *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684; *Archawski* v. *Hanioti*, 350 U. S. 532; *Sword Line* v. *United States*, 351 U. S. 976.

2. Respondent relies upon Section 3 of the Suits in Admiralty Act (providing that suits thereunder "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties"), asserting that set-off would be impermissible if petitioner were a private party. The Government, respondent says (Brief, p. 4), "does not deny" this. Respondent is in error. We carefully pointed out in our petition (pp. 11–13) that the reasons which prompted admiralty courts, 130 years ago, to limit set-offs to those then permissible in equity have ceased to exist; that equity, for at least 45 years, has permitted unrestricted set-off; that the restrictive rule upon which the court below relied has lost all vitality; and that the result reached below is in conflict with principles enunciated by this Court.[1]

[1] The brief in opposition (p. 10) makes the specious argument that the result reached by the court below is identical in substance with the one obtainable under the Federal Rules of Civil Procedure, because, under those Rules, the court could have ordered a separate trial, entered partial judgment, and stayed it. A separate trial, of course, would not be ordered where, as here, the *pro forma* claim is undisputed and the sole controversy is the justifiability of the withholding (cf. Pet. p. 12, fn. 11).

We also urged that there are independent reasons for concluding that Congress did not propose, by the Suits in Admiralty Act, to curtail the Government's traditional power to withhold and apply or to except maritime claims from its exercise. To that view we also adhere.

Respectfully submitted,

J. LEE RANKIN,
*Solicitor General.*

GEORGE COCHRAN DOUB,
*Assistant Attorney General.*

SAMUEL D. SLADE,
HERMAN MARCUSE,
*Attorneys.*

SEPTEMBER 1958.

No. 285

# In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER,

*v.*

ISTHMIAN STEAMSHIP COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
*Solicitor General,*
GEORGE COCHRAN DOUB,
*Assistant Attorney General,*
RALPH S. SPRITZER,
*Assistant to the Solicitor General,*
SAMUEL D. SLADE,
LEAVENWORTH COLBY,
SEYMOUR FARBER,
*Attorneys,*
*Department of Justice, Washington 25, D. C.*

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## CITATIONS

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OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA, PETITIONER

*v.*

ISTHMIAN STEAMSHIP COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 16–19) is reported at 134 F. Supp. 854. The opinion of the Court of Appeals (R. 23–24) is reported at 255 F. 2d 816. The opinion of the Court of Appeals in the related case of *Grace Line, Inc.* v. *United States*[1] (Appendix, *infra*, pp. 34–44), is reported at 255 F. 2d 810.

[1] The opinion in the instant case incorporates by reference the reasons expressed by the court in *Grace Line, Inc.* v. *United States*. Review of the decision in the *Grace Line* case was not sought because that decision rests on an additional ground which, at the present time, does not appear to be of general importance. See fn. 3, p. 6, of the petition for certiorari in this case.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1958 (R. 25). The time within which to file a petition for a writ of certiorari was extended to and including August 19, 1958, by order of Mr. Justice Harlan, dated July 30, 1958 (R. 26). The petition for a writ of certiorari was filed on August 19, 1958, and granted on October 13, 1958 (R. 26). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Government's long-standing power under 31 U. S. C. 71 to effectuate administrative recoupment, *i. e.*, to withhold funds which it admittedly owes a claimant and to apply them toward the satisfaction of an independent debt which the latter owes to the United States, is inoperative in the field of admiralty.

2. Whether a court, awarding interest in a case arising under the Suits in Admiralty Act, may make an award exceeding the 4 per centum statutory limit by allowing interest on the interest which accrued between the filing of the suit and the entry of the final decree.

## STATUTES AND ADMIRALTY RULES INVOLVED

1. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U. S. C. 71, provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as

debtor or creditor, shall be settled and adjusted in the General Accounting Office.

2. Section 3 of the Suits in Admiralty Act, 41 Stat. 526, 46 U. S. C. 743, provides in pertinent part:

> * * * A decree against the United States * * * may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. * * *

3. Section 5 of the Suits in Admiralty Act, 41 Stat. 526, as amended, 46 U. S. C. 745, provides in pertinent part:

> * * * [N]o interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest.

4. The General Admiralty Rules provide in pertinent part as follows:

> Rule 44.
>
> In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.
>
> Rule 50.
>
> Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was

filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

5. The Admiralty Rules of the United States District Courts for the Southern and Eastern Districts of New York provide in pertinent part as follows:

Rule 16.

If a respondent or claimant shall desire to recoup or set off any damages sustained by him growing out of the transactions referred to in the libel, he must in his answer state the facts and his own damages in like manner as upon filing a cross-libel, and such statement shall be without prejudice to any other defense which he may interpose. He shall not, however, be entitled to any affirmative recovery upon such answer. In any case where a cross-libel *in personam* will lie, service of such cross-libel may be made on the proctors for the libellant.

Rule 17.

A respondent or claimant may, by petition or pleading, state a claim, arising out of the transaction, occurrence or property that is the subject matter of the original cause, against a co-party who has appeared or claimed in the suit. The petition or pleading may be served upon the proctor for the party against whom the claim is asserted, and in such case the party so

pleaded against shall except to or answer the petition or other pleading within three weeks after such service upon its proctor.

## STATEMENT

### 1. The facts

In 1946, the United States, acting through the War Shipping Administration,[2] chartered out eight vessels to the respondent, Isthmian Steamship Company (Isthmian) on a bare boat basis (R. 6). The charter agreement contained a clause which provided that, if Isthmian's net voyage profits should exceed ten per centum per annum of the capital invested by the charterer during the term of the agreement, Isthmian would pay the United States a part of such excess as additional charter hire (R. 6–7). The United States determined that the additional charter hire due it under this clause, for the period from May 1, 1946 to July 31, 1948, amounted to $115,203.76 (R. 7).

In 1953, Isthmian's vessel *S. S. Steelworker*—not one of the vessels involved in the 1946–1948 bare boat charters—carried certain military cargo for the United States. When Isthmian submitted a freight bill for $116,511.44 (R. 4), the United States, on June 3, 1953, acting pursuant to 31 U. S. C. 71 (*supra*,

[2] Section 202 of the Act of July 8, 1946, 60 Stat. 501, terminated the War Shipping Administration as of September 1, 1946, and transferred its functions to the United States Maritime Commission for the period from September 1, 1946 to December 31, 1946, for the purpose of liquidating the Administration. Upon the abolition of the United States Maritime Commission (1950 Reorg. Plan No. 21, 15 F. R. 3178, 64 Stat. 1273), the remaining functions were transferred to the Department of Commerce, Maritime Administration.

pp. 2–3), withheld the sum of $115,203.76 from that bill, and applied it to the payment of Isthmian's indebtedness to the United States for additional charter hire (R. 8).

### 2. The litigation

#### a. In the Court of Claims

Isthmian first sued in the Court of Claims to recover the amount withheld. Its complaint alleged that it had carried cargo on the *S. S. Steelworker* for the Military Sea Transportation Service; that it had submitted a freight bill for its services in the amount of $116,511.44; that the United States did not deny that this sum was owing for transportation of the cargo; that, nevertheless, the Military Sea Transportation Service had drawn a check in the sum of $115,203.76 to the Maritime Administration to cover an alleged claim for additional charter hire, the validity of which Isthmian denied. The United States moved to dismiss on the ground that the subject matter of the controversy was either Isthmian's claim for maritime freight or the Government's claim for additional charter hire, and that, in either event, the district courts had exclusive jurisdiction under the Suits in Admiralty Act. The Court of Claims agreed and granted the motion. *Isthmian Steamship Co. v. United States*, 131 C. Cls. 472.

#### b. In the District Court

Shortly before the dismissal of its complaint in the Court of Claims, Isthmian filed a libel in the United States District Court for the Southern District of New York alleging that the United States owed Isthmian freight charges for certain cargo transported

on the *S. S. Steelworker;* that Isthmian had presented a bill for $116,511.44; and that the United States had failed and refused to pay $115,203.76 due and payable under the bill of lading (R. 3–4). Unlike its pleading in the Court of Claims, Isthmian's libel made no reference to the fact that the Government had withheld the $115,203.76 in order to satisfy its claim in that amount for additional charter hire.

The answer of the United States (R. 5–8) admitted that Isthmian had submitted a claim for maritime freight for $116,511.44; denied that the Government had failed and refused to pay $115,203.76; and alleged that this sum had been paid by applying it to Isthmian's indebtedness to the United States for additional charter hire in the same amount. Shortly before answer, the Government had filed in the same court a cross-libel against Isthmian for the recovery of $115,203.76 additional charter hire. The day after the filing of its answer, the United States moved to consolidate Isthmian's libel with the Government's cross-libel on the ground that the question of the validity of the Government's claim for additional charter hire was fully dispositive of both libels (R. 9–12).

Isthmian excepted to the answer on the ground that the defensive matter pleaded therein did not arise "out of the same contract, cause of action or transaction for which the libel was filed" (R. 14). It moved that the excepted matter be stricken from the answer and that Isthmian be given judgment on the pleadings (R. 15).

The District Court held that the defense of withholding and applying did not constitute a plea of pay-

ment, but that it constituted a claim of set-off arising from a discrete transaction. Holding further that admiralty had no jurisdiction over such a set-off, it struck the Government's defense and awarded judgment to Isthmian. The court also denied the motion to consolidate because, after the Government's defense had been stricken, Isthmian's libel and the Government's libel no longer had any common issue (R. 16–19).

The final decree awarded Isthmian the sum of $115,203.76, with interest at 4 per centum per annum from the time of the filing of the complaint to the day of decree, amounting to $2,070.51, and $40 costs, totalling $117,314.27. It awarded further interest on that total, at the rate of 4 per centum, from the date of the decree until paid (R. 21). The interest which accrued during the pendency of the litigation in the District Court ($2,070.51) is drawing interest at the rate of 4 per centum per annum; in other words, it has been compounded.

c. In the Court of Appeals

The Court of Appeals affirmed the decision of the District Court on the authority of its ruling in *Grace Line, Inc.* v. *United States,* 255 F. 2d 810, decided on the same day (Appendix, *infra,* pp. 34–44).

In *Grace Line,* the Court of Appeals held that the Government's defense of withholding and applying did not constitute a plea of payment but one of set-off or counterclaim. Such set-off, in the court's view, was not cognizable in admiralty because it did not arise from the transaction on which the libel was based.

Dealing with the Government's argument that its disputed claim for additional charter hire constituted the actual subject matter of the instant controversy, the court said that no "amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure" (Appendix, *infra*, p. 42). It concluded that the proper procedure in this type of litigation is to enter a decree *pro confesso* for the libelant. The Government, the court said, may then pursue a remedy under 31 U. S. C. 227, *i. e.*, the Comptroller General can withhold payment of the amount awarded by the decree and cause a new action to be instituted against libelant (Appendix, *infra*, p. 40).

The Court of Appeals also held that Section 3 of the Suits in Admiralty Act, which provides that interest at the rate of not to exceed 4 per centum per annum may be awarded to "run as ordered by the court", authorized the District Court to exceed the 4 per centum rate by the compounding of interest (Appendix, *infra*, pp. 43–44).

## SUMMARY OF ARGUMENT

### I

Isthmian's libel alleged non-payment of a freight bill. The Government, conceding the correctness of that freight bill, defended on the ground that it had withheld the amount due thereon and had applied the money in satisfaction of a pre-existing maritime claim which the United States had against

Isthmian. The court below has ruled that this defense is not cognizable in admiralty. Its view is that the defense cannot be regarded as one of payment or satisfaction; that the Government is asserting an unrelated or independent set-off; and that it would be contrary to settled admiralty practice to allow such a set-off to be pleaded. It accordingly concluded that Isthmian is entitled to judgment and that the Government's remedy is to institute a second suit to get back the amount of the judgment entered in this suit.

We urge, as numerous decisions of this Court have held, that the Government has the power to strike a balance between the debts which it owes to a private party and the claims which it has against that party. Administratively, it may "set off one debt against another, when a claimant is both debtor and creditor," *McKnight* v. *United States*, 13 C. Cls. 292, 306, affirmed, 98 U. S. 179. When the Government takes such action, *i. e.*, when the United States withholds the amount of its admitted debt and applies it in satisfaction of its own claim, "the true dispute between the parties" is whether the Government's claim is a valid one, *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U. S. 253, 263. That, indeed, is the only dispute.

The decision below renders meaningless, in the single class of cases where the Government is dealing with an ocean carrier, the power to withhold and apply. For although the Government has attempted to apply the amount of its admitted debt in satisfaction of its claim, the decision below holds that Isthmian may collect the amount withheld on a mere showing of what is undisputed, *i. e.*, that Isthmian's

freight bill is correct, and that the Government's recourse is by another suit. This is to ignore the substance of the one existing dispute and to permit the form of Isthmian's pleading to control. The binary fission which results has nothing to recommend it unless it be that it succeeds in making two lawsuits grow where only one could be seen before.

We do not, of course, suggest that the Government's act of withholding and applying in any way limits judicial review of the claim upon which that action is predicated. We say simply this: That when the Government applies money which it admittedly owes Isthmian in satisfaction of its own pre-existing claim against Isthmian, it places upon Isthmian a clear choice—to acknowledge the validity of the Government's claim or to bring suit challenging that claim.

## II

Alternatively, we argue that, even if the Government's defense be construed as one asserting an independent set-off, it was still within the jurisdiction of the admiralty court and should have been resolved. Policy considerations which, in other circumstances, might justify a refusal to consider an independent set-off in admiralty (*e. g.*, that such consideration would defeat the adverse party's right of trial by jury) have no applicability to the case at bar. There is no reason why admiralty, the forerunner in flexible practice, should decline jurisdiction over a claim which would be clearly permissible under modern practice in a civil or equity court. And neither the admiralty rules of this Court nor the local admiralty

rules forbid adoption of a procedure which would resolve, in one lawsuit, the single controversy between the parties.

III

To the extent that the decision below approves a departure from the statutory 4 per centum limit on the rate of interest which may be awarded in cases arising under the Suits in Admiralty Act, it disregards the settled rule that statutes authorizing the award of interest against the United States are to be strictly construed and that they are deemed to refer to simple interest only.

ARGUMENT

I

**The Government's defense of withholding and applying, based upon its power to effectuate administrative recoupment, is cognizable in admiralty**

We argue here that the Court of Appeals erred in failing to recognize, *first,* that the Government's defense of withholding and applying is in the nature of a plea of payment, which is, of course, within the jurisdiction of the admiralty courts, and *second,* that in a libel designed to challenge the exercise by the Government of its power to withhold and apply, the Government's disputed claim—the only real controversy between the parties—should be resolved by the admiralty court.

**A. The legal import of the Government's defense was payment, not set-off**

Section 305 of the Budget and Accounting Act of 1921, 31 U. S. C. 71, *supra,* pp. 2–3, which stems from the Act of March 3, 1817, 3 Stat. 366, and from R. S.

236,[3] provides that all claims and demands by or against the Government shall be settled and adjusted in the General Accounting Office.[4] For nearly a century it has been established that this power to "settle and adjust" includes the authority, if not the duty, "to set off one debt against another, when a claimant is both debtor and creditor". *McKnight* v. *United States,* 13 C. Cls. 292, 306, affirmed, 98 U. S. 179; see, also, *Taggart* v. *United States,* 17 C. Cls. 322, 327–328; *Schooner Henry and Others* v. *United States,*

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[3] Cf. *United States* v. *Jones*, 119 U. S. 477, 479–480.

[4] There are a number of other statutory provisions which similarly authorize the accounting officers of the Government to withhold and apply in special circumstances. *E. g.*, the Act of March 3, 1875, 18 Stat. 481, as amended, 31 U. S. C. 227, provides for the withholding of payment of a judgment recovered against the United States on account of an indebtedness of the judgment-creditor to the United States; R. S. 1766, 5 U. S. C. 82, provides for the withholding of the salary or compensation of an accountable officer who is in arrears to the United States; the Act of July 15, 1954, 68 Stat. 482, 5 U. S. C. (Supp. III) 46d, provides for the withholding, within certain limitations, of the current salary of Government employees.

Another specialized enactment is Section 322 of the Transportation Act of 1940, 54 Stat. 955, as amended by P. L. 762, 85th Cong., 2d Sess. See *United States* v. *Western Pacific R. Co.*, 352 U. S. 59; *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U. S. 253. Under Section 322, the United States is required to pay for the carriage of mail, persons, or property "upon presentation" of the bill. Overcharges, if any, may then be deducted from "any amount subsequently found to be due such carrier." It should be noted that, since the statute applies to carriers subject to the Interstate Commerce Act, it encompasses claims for inland water and coastal shipments (Section 1 of the Interstate Commerce Act, as amended, 49 U. S. C. 1), which are, like the ocean claim here, within the jurisdiction of the admiralty courts.

35 C. Cls. 393, 395. As this Court has noted, when the Government exercises its power under 31 U. S. C. 71, it "strike[s] a balance between the debts and credits of the government." *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240. Thus, when the United States withholds payment on a debt owed by it and applies it to a valid claim of its own, the indebtedness of the claimant to the United States is discharged, and, conversely, the substance of his claim against the United States is destroyed. *McKnight* v. *United States*, 98 U. S. 179; *United States* v. *American Surety Co.*, 158 F. 2d 12, 13 (C. A. 5); *Sanders* v. *Commissioner of Internal Revenue*, 225 F. 2d 629, 637 (C. A. 10), certiorari denied, 350 U. S. 967; *American Railway Express Co.* v. *United States*, 62 C. Cls. 615, 636, certiorari denied, 273 U. S. 750; *Morgan* v. *United States*, 131 F. Supp. 783 (S. D. N. Y.).

The defense of withholding and applying, therefore, is in the nature of a plea of payment.[5] Concretely, in this case it explains the Government's denial of the allegation in the libel that the United States had failed and refused to pay the $115,203.76 in dispute (*supra*, p. 7). To be sure, the debt owed by the Government is not discharged by the mere *ipse dixit* of the Comptroller General that the claimant, himself, is indebted to the United States. The courts have full power to review the Comptroller's action and to

[5] On the historic relationship between the pleas of payment and set-off, see Waterman, *A Treatise on the Law of Set-Off, Recoupment, and Counterclaim* (1869), Section 560. The author points out that, in the middle of the last century, set-off was raised in several jurisdictions by plea of payment.

determine whether the Government had a valid claim, for only in that event has the Government's indebtedness been discharged. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240. Accordingly, contrary to the view held by the court below (Appendix, *infra*, p. 37), the exercise by the Government of its power to withhold and apply is not intended to "bypass the process of adjudication." The effect, rather, is to put the controversy in focus. For when the Government acts upon its claim of right (*i. e.*, when it applies money which it admittedly owes to "X" in satisfaction of its own pre-existing claim against "X"), it places upon the other party a clear choice: to acknowledge the validity of the Government's claim or to dispute it by bringing suit.

**B. The validity of the Government's contested claim, not the libelant's uncontested claim, is the real subject matter of this litigation**

When a defendant admits all the basic allegations of a complaint and sets up an affirmative defense, the issue which emanates from the answer is the subject matter of the litigation. A litigant may not curtail his opponent's defense by artfully framing his complaint so as to make *bona fide* defenses going directly to the heart of the controversy assume the appearance of a set-off or counterclaim unrelated to the subject matter of the action. Cf. *Eastern Transportation Co.* v. *Blue Ridge Coal Corp.*, 159 F. 2d 642, 643 (C. A. 2); *United States* v. *West*, 8 App. D. C. 59, 64; *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. 2d 582, 586 (C. A. 8); *Lesnik* v. *Public Industrial Corporation*, 144 F. 2d 968, 975 (C. A. 2); *Cleveland Engi-*

*neering Co.* v. *Galion D. M. Truck Co.*, 243 Fed. 405, 407 (N. D. Ohio).

The essential nature of this action thus cannot be concealed by the fact that respondent, in the formal allegations of its libel, limited itself to a recital of its claim for maritime freight and omitted all reference to the Government's withholding action (which, significantly, had been detailed in respondent's prior complaint in the Court of Claims). The substance of this case is that respondent was seeking money which the Government was withholding and that the Government was withholding, not because it questioned respondent's claim, but solely because of a contested claim which it had against respondent.

In holding that it was bound by the formal allegations of the complaint, the court below acted contrary to the teaching of this Court in *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U. S. 253, 263, *viz.*, that, in actions of this type, the courts are concerned with substance, not form, and that, although the complaint may set forth only the claimant's uncontested claim, the true dispute between the parties—the lawfulness of the claim on which the withholding is based—must be determined.

The facts of that case, strikingly analogous to those presented here, are recited at the outset of this Court's opinion as follows (355 U. S. at 254–255):

> The General Accounting Office audited transportation bills of the respondent, rendered and paid in 1944, and determined that the Government was overcharged in the amount of $1,025.26. When the respondent did not refund

this amount on demand, the Government exercised the right, reserved in § 322 of the Transportation Act of 1940, to deduct the overpayments from a subsequent bill. The Government credited that amount against a bill of the respondent, admittedly owing, of $1,143.03 for 1950 transportation services, and paid the balance of $117.77 by check.

The respondent thereupon brought this action under the Tucker Act in the District Court for Massachusetts. The complaint seeks recovery not of the $1,025.26 deducted, but of the full amount of the 1950 bill of $1,143.03. The Government's answer admits the 1950 bill but pleads its payment by the check of $117.77 and the credit of $1,025.26 in liquidation of the overcharges determined in the 1944 bills. The respondent filed a pleading in response to the government answer admitting "that it did receive the check in the amount of $117.77, all as recited by the defendant, leaving the balance due and to this date unpaid in the amount of $1,025.26."

The question presented in both courts below, and in this Court, is whether in this action the carrier has the burden of proving the correctness of the 1944 bills, or the Government the burden of proving that it was overcharged. The District Court held that the respondent carrier was pleading on a contract against which the Government was attempting to "set off" claims under other contracts, and that "whoever attempts to set off the other contractual claims has the burden of showing there are other claims."

This Court reversed, concluding that the matter was not one of set-off. "The true dispute between the parties," the Court stated (pp. 263–264), "involves the lawfulness of the 1944 bills. * * * [T]he respondent is entitled to recover only if it satisfies its burden of proving that its 1944 charges were computed at lawful and authorized rates."

In its present posture, the instant case presents no issue of burden of proof but simply the question whether the "true dispute between the parties" may be litigated. The *New Haven* case certainly provides an affirmative answer to that question unless this Court should conclude that where ocean carriers are concerned the Government lacks withholding authority (but see pp. 12–15, *supra,* and the discussion of the *Alcoa* case, which follows immediately).

In *Alcoa S. S. Co.* v. *United States,* 338 U. S. 421, the Government had paid freight allegedly due for the transportation of cargo on the S. S. "Gunvor," which was sunk before it completed its voyage. Subsequently, the United States determined that the freight had not been earned by the plaintiff and deducted the sum paid from freight charges admittedly due for transportation performed on two other vessels belonging to the plaintiff, the S. S. "Plow City" and S. S. "Alcoa Trader". Plaintiff thereafter brought an action under the Tucker Act[*] on the conceded claim, alleging that the Government had unlawfully deducted some $3,520.52. The answer, admitting the freight earned by the S. S. "Plow City" and S. S. "Alcoa Trader", set forth in detail the

[*] See p. 20, fn. 8, *infra.*

shipment on the "Gunvor", the erroneous payment of freight for the shipment on that vessel, and the application of part of the freight admittedly due on the S. S. "Plow City" and S. S. "Alcoa Trader" toward the overpayment on the "Gunvor".

In contrast to its approach in the instant case, the Second Circuit did not take the position that the freight concededly earned on the shipment on the "Plow City" and "Alcoa Trader" constituted the true subject matter of the lawsuit, and that the Government's plea of withholding and applying constituted a discrete claim. Judge Learned Hand's opinion[7] declares at the outset (175 F. 2d 661):

> The question in the case is whether the United States overpaid the freight due to the petitioner * * * upon a cargo of lumber shipped upon petitioner's ship, "Gunvor".

The Court of Appeals thus recognized that the propriety of the withholding was the sole issue in the case.[7a] This interpretation of the pleadings was accepted by this Court, which stated (338 U. S. at 422):

> At bar is the single question of contract interpretation whether a carrier's "Goods or Vessel lost or not lost" provision survives the terms of the government standard form bill of lading.

It is true that in *Alcoa* the complaint was based on the Tucker Act and not on the Suits in Admiralty

[7] The other members of the panel were Judge Augustus N. Hand (who dissented on other grounds) and Judge Frank.

[7a] To similar effect, see *Pacific-Atlantic Steamship Co.* v. *United States*, 1956 A. M. C. 245 (W. D. Wash.).

Act.[8] Nevertheless, it is difficult to understand how the Second Circuit, which considered the propriety of the withholding "the question in the case" in proceedings brought under the Tucker Act, could hold, as it did here, that this very issue constituted an "unrelated set-off" over which it had no jurisdiction in a proceeding brought under the Suits in Admiralty Act.

*Wabash Ry. Co.* v. *United States*, 59 C. Cls. 322, affirmed *sub nom. United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, is also analogous. In that case, the United States had deducted the amount of certain alleged overpayments from subsequent uncontested freight bills. In answer to a complaint seeking to recover the sum withheld, the United States pleaded the statute of limitations, alleging that the proceedings had been started more than six years after the uncontested freight had been earned. The Court of Claims rejected this defense because (59 C. Cls. at 327):

> * * * the deductions were made within six years prior to the beginning of this suit. Plainly the plaintiff's cause of action did not arise until deductions were made from its subsequent bills. * * * Properly speaking, *its right*

[8] The Government had challenged the Tucker Act jurisdiction in the district court without success. Cf. 80 F. Supp. at 162–163. Since the claim involved less than $10,000 and suit had been filed within the shorter limitations period fixed by the Suits in Admiralty Act, the question whether the action should have been placed on the civil or admiralty calendar did not seem to present a substantial appealable issue. Recent decisions such as *Prudential S. S. Corp.* v. *United States*, 220 F. 2d 655 (C. A. 2); and *Lykes Bros. S. S. Co., Inc.* v. *United States*, 129 C. Cls. 455, certiorari denied, 348 U. S. 971, indicate that the case should have been brought under the Suits in Admiralty Act.

> *of action is upon or because of these deductions,* and this is not barred by the statute of six years, the suit having been duly instituted within that time. [Emphasis added.]

Similarly, where the United States withholds payments of a pension on the basis of Government claims against the pensioner, the courts have had no difficulty in reviewing the propriety of the withholding, *i. e.*, in examining the validity of the Government's claim, despite the fact that they lack jurisdiction over pension claims. 28 U. S. C. 1346 (d), 1501. *Reynolds* v. *United States,* 292 U. S. 443; *Price* v. *United States,* 121 C. Cls. 664, certiorari denied, 344 U. S. 911; cf. *McElhany* v. *United States,* 101 C. Cls. 286, 291–292.

In all of these cases, the lawfulness of the Government's withholding constituted the real subject matter of the litigation; there was no other dispute to be litigated. The same is true here: There is only one dispute between the parties, and that dispute, despite the contrived pleadings of the respondent, should have been resolved by the court below.

## II

**Assuming *arguendo* that the Government's defense constituted a set-off not arising from the same transaction upon which the libel was based, the court below had jurisdiction to entertain the defense**

We have argued above that the Government's defense did not constitute an unrelated set-off but formed the basis of the very controversy for which the libel was filed. We urge here that admiralty has jurisdiction over this defense even if it should be deemed (contrary to our view) an unrelated set-off.

**A. The jurisdiction of the admiralty courts over set-offs is not limited to those arising from the same transaction**

Admiralty courts from time immemorial have led in the development of a flexible practice adapted to the general conditions of maritime litigation but capable of adjustment to the needs of special circumstances.[9] Indeed, this capacity to develop for itself methods and procedures enabling it to deal with the various circumstances that may confront it constitutes the very essence of admiralty, distinguishing it from common law and equity.[10] This Court has only recently commented that "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating

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[9] See Woolsey, D. J., in *The Cleona*, 37 F. 2d 599, 600 (S. D. N. Y.):

"In the first place, it must be remembered that, fortunately, admiralty practice is plastic. It is largely judge-made, and consequently not technical—in fact, it is less technical than equity practice. Broadening from precedent to precedent, and based on a wisely administered convenience, admiralty practice has always been prepared to cope with new situations as they have arisen. * * * Whilst the practice thus formed on precedent has from time to time been embodied in rules by the Supreme Court which have caused a wise procedure in one court to be made universal in the admiralty courts of the United States, there has never been any tendency in the rules which the Supreme Court has promulgated to limit the freedom of the District Courts in adopting new rules or principles of admiralty practice on appropriate occasion, provided the practice adopted does not conflict with the Supreme Court rules."

[10] *The Epsilon*, 6 Ben. 378, 8 Fed. Cas. 744, 748, No. 4,506 (E. D. N. Y.); see, also, *Dowling* v. *Isthmian S. S. Corp.*, 184 F. 2d 758, 778 (C. A. 3).

from other federal practices." *British Transport Commission* v. *United States*, 354 U. S. 129, 139.

It is appropriate, we believe, that the Court consider the origin of the doctrine that set-offs in admiralty are limited to those arising from the identical transaction pleaded in the libel. In our view, the rule limiting set-off and counterclaims in admiralty is not of a categorical nature, and none of the considerations underlying the rule has vitality here.

1. The first cases narrowing the scope of set-off and counterclaims in admiralty were grounded upon the desire to protect the wage claims of seamen. See, *e. g.*, *Willard* v. *Dorr*, 3 Mason 161, 171–172, 29 Fed. Cas. 1277, 1280, No. 17680 (C. C. D. Mass.); *The Hudson*, Olc. 396, 12 Fed. Cas. 805, No. 6831 (S. D. N. Y.); *Bains* v. *The James and Catherine*, Baldw. 544, 2 Fed. Cas. 410, No. 756 (C. C. D. Pa.). In *Bains* v. *The James and Catherine, supra* (p. 422), the court pointed to the hardship which would be visited upon a seaman and his family if, upon his return from a long voyage, he found his wages applied toward some debt due the owner of the vessel or—even worse—purchased by the owner from another.[11] Obviously, this policy has no application in the present case. Moreover, since 1872 the protection of seamen's wage claims against set-off has been achieved by statute. Cf. *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 781.

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[11] For a more recent example of this policy, see *Shilman* v. *United States*, 164 F. 2d 649 (C. A. 2), certiorari denied, 333 U. S. 837.

2. A number of practical considerations, based primarily upon the need for trial convenience, have encouraged limitations on set-offs in admiralty. One of these is the desire to prevent a complicated trial from becoming utterly unmanageable by the injection of extraneous issues. Cf. *Powell* v. *United States,* 300 U. S. 276, 289–290. This consideration, of course, is not applicable where, as here, the claim upon which the libel is based is undisputed and the sole controversy centers on the justification of the withholding. Moreover, complicated trials can be avoided by ordering separate trials in appropriate cases, as is commonly done under Rule 42 (b), Federal Rules of Civil Procedure.

Another factor in admiralty's reluctance to permit set-off has been the possible effect on third party rights. Cf. *Howard* v. *9,889 Bags of Malt,* 255 Fed. 917, 918 (D. Mass.); *The Leonidas,* Olc. 12, 15 Fed. Cas. 348, No. 8262 (S. D. N. Y.); *Castner, Curran & Bullitt* v. *United States,* 5 F. 2d 214 (C. A. 2); *The Ping-On* v. *Blethen,* 11 Fed. 607, 611 (C. C. D. Cal.). Here, the single issue underlying the litigation involves only two parties, both of whom were before the admiralty court.

Finally, admiralty has been loath to permit the trial of a set-off based upon a non-maritime transaction because of the effect upon the adverse party's right to a jury trial. *Bains* v. *The James and Catherine,* Bald. 544, 2 Fed. Cas. 410, No. 756 (C. C. D. Pa.); *Willard* v. *Dorr,* 3 Mason 161, 171–172, 29 Fed. Cas. 1277, 1280, No. 17680; *The Hudson,* Olc. 396, 12 Fed.

Cas. 805, No. 6831 (S. D. N. Y.); *Castner, Curran & Bullitt* v. *United States,* 5 F. 2d 214 (C. A. 2); *Koch-Ellis Marine Contract.* v. *Phillips Petroleum Co.,* 219 F. 2d 520 (C. A. 5); *The Yankee,* 37 F. Supp. 512 (E. D. N. Y.). This consideration plays no role here since the Government's set-off, predicated upon the alleged breach of a maritime contract, is plainly within the admiralty jurisdiction. *Krauss Bros. Co.* v. *Dimon S. S. Corp.,* 290 U. S. 117, 124–125; *Archawski* v. *Hanioti,* 350 U. S. 532, 534–536.

3. The early cases limiting set-off in admiralty also took the view that in this, as in many other aspects of procedure, admiralty followed equity. Cf. *The Dove,* 91 U. S. 381, 385; *Willard* v. *Dorr,* 3 Mason 161, 171–172, 29 Fed. Cas. 1277, 1280, No. 17680 (C. C. D. Mass.); *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.,* 116 Fed. 857, 858 (C. A. 1). Equity, however, has permitted independent set-offs and counterclaims since (if not before) the promulgation of the Equity Rules of 1912. Rule 30, 226 U. S. 657.[12] There is no sound reason why admiralty should now lag behind equity. Cf. *British Transport Commission* v. *United States,* 354 U. S. 129, 139. Indeed, the Second Circuit itself has aptly observed that "it is legitimate to treat it [admiralty] as not immune to some of the changes in procedure elsewhere." *Boston Insurance Co.* v. *City of New York,*

[12] The scope of Equity Rule 30 has been clarified and somewhat expanded by Rule 13, Federal Rules of Civil Procedure. See 3 Moore, *Federal Practice* (Second Edition), Section 13.03.

130 F. 2d 156.[13] Reassertion in this case of the view that independent set-offs are categorically barred from the admiralty jurisdiction is an anachronism.[14]

4. There is still another reason why it is peculiarly inappropriate to apply such restrictions here. Prior to the enactment in 1920 of the Suits in Admiralty Act, the Court of Claims and (in cases involving less than $10,000) the district courts had jurisdiction over claims arising under maritime contracts like the one at bar. In such proceedings, the United States had unlimited power of set-off under the equivalents of the present 28 U. S. C. 1346 (c) and 1503. It is hardly to be assumed that, when the Suits in Admiralty Act transferred most maritime claims against the United States to the exclusive jurisdiction of the admiralty courts,[15] Congress sought to curtail the Government's power to withhold and apply.[16]

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[13] See, also, *Schiavone-Bonomo Corporation* v. *Buffalo Barge Towing Corp.*, 134 F. 2d 1022 (C. A. 2), certiorari denied, 320 U. S. 749; *Esso Standard Oil Co.* v. *United States*, 174 F. 2d 182, 186 (C. A. 2).

[14] The anachronism is further highlighted when it is realized that a non-related counterclaim based on a maritime tort may be pleaded in a civil action brought under the Jones Act. *Fraser* v. *Astra S. S. Corp.*, 18 F. R. D. 240 (S. D. N. Y.).

[15] *Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320.

[16] The mere fact that the Suits in Admiralty Act does not contain an express equivalent to 28 U. S. C. 1346 (c) and 1503 certainly does not foreclose the right of set-off. The Government's power to withhold and apply does not flow from procedural provisions such as 28 U. S. C. 1346 (c) and 1503, permitting set-off, but from 31 U. S. C. 71, which is of a substantive nature. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 239–240; *Eastern Transportation Co.* v. *United States*, 159 F. 2d 349, 352 (C. A. 2); *Malman* v. *United States*, 207 F. 2d 897 (C. A. 2). Admiralty can fashion the procedural means

**B. Neither the General Admiralty Rules of this Court nor the Admiralty Rules of the District Court require exclusion of the Government's defense**

Apart from its holding that the Government's defense of withholding and applying was barred by "settled admiralty practice", the court below was of the view that the same result was "implicitly require[d]" by this Court's Admiralty Rule 50 (*supra*, pp. 3–4) and by Admiralty Rules 16 and 17 of the District Courts for the Southern and Eastern Districts of New York (*supra*, pp. 4–5).

This Court's Rule 50 provides that:

> Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

It seems clear that Rule 50 deals merely with the giving of security where (1) the claims are reciprocal and (2) one party has already posted security. It

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for enforcing any substantive law it has been called upon to administer. *The Epsilon*, 6 Ben. 378, 389, 8 Fed. Cas. 744, 748, No. 4506 (E. D. N. Y.); *The Hudson*, 15 Fed. 162 (S. D. N. Y.); *Dowling* v. *Isthmian Steamship Corp.*, 184 F. 2d 758, 778 (C. A. 3). And it may not prescribe a rule abridging or modifying a substantive right created by Congress. 28 U. S. C. 2073.

"has no application unless the respondent or claimant in the original suit, *i. e.*, the cross-libelant, has given security to respond in damages and has given it under compulsion to obtain the release of a vessel or of property under attachment." 2 Benedict, *Admiralty*, (6th ed.), Sec. 331. We find nothing in Rule 50 which purports to limit the district courts' jurisdiction over an unrelated set-off, particularly in a situation where the "set-off" constitutes the sole controversy between the parties. Moreover, Rule 50 has no direct bearing on cases where, as here, the respondent does not seek affirmative relief. *Mayer & Lage* v. *Prince Line*, 264 Fed. 854, 855 (S. D. N. Y.).

Rule 16 of the Southern and Eastern Districts of New York does in terms limit set-offs in admiralty to damages suffered by the respondent growing out of the "transactions referred to in the libel".[17] We do not believe, however, that the Rule is to be construed as conferring upon the libelant the power to limit the respondent's rights by the simple expedient of engaging in an artificially restrictive description of the actual matter in controversy. So construed, the rule would be arbitrary.

More broadly, we suggest that the rule-making power of the district courts does not include authority

[17] The quoted language does not follow this Court's Rule 50 and it is also at variance with local Rule 17. Thus, Rule 17 refers to "the transaction, occurrence or property that is the subject matter of the original cause * * *." The Government's defense meets that formulation, for, in our view, the subject matter of the original cause, disclosed by the pleadings as a whole (albeit disguised in the libel), is the validity of the claim which gave rise to the Government's act of withholding and applying.

to place categorical restrictions on the assertion of set-offs. This Court's Rule 44 (*supra*, p. 3) confers upon the district courts the power "to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided they are not inconsistent with these rules." The import of Rule 44 is that the district courts shall promulgate rules involving local problems. The right of set-off and the scope of that right are matters which substantially affect admiralty practice throughout the nation and should not, we believe, be frozen locally by district court rules.

Moreover, it would be completely out of keeping with the basic character of admiralty practice to require the Government to prosecute a separate lawsuit—involving additional expense, inconvenience and lapse of time—in order to adjudicate the very controversy which moved the respondent to file its libel. Admiralty, which "looks to a complete and just disposition of a many cornered controversy", *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216, can certainly dispose expeditiously of this litigation involving, as it does, only one issue and two parties.[18]

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[18] In admiralty, as at law, "[i]t would be folly to require the government to pay under the one contract what it must eventually recover for a breach of the other." *Pacific-Atlantic Steamship Co.* v. *United States*, 1956 A. M. C. 245, 246 (W. D. Wash.).

## III

### The District Court improperly awarded compound interest against the United States

Section 3 of the Suits in Admiralty Act, 41 Stat. 526, 46 U. S. C. 743, provides in pertinent part:

> * * * A decree against the United States * * * may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. * * *

The District Court's final decree (R. 21) awarded to respondent:

> * * * the sum of $115,203.76, with interest at four percent (4%) per annum from March 29, 1955 [the day the libel was filed], amounting to the sum of $2,070.51, together with costs in the sum of $40.00, as taxed, amounting in all to the sum of $117,314.27, with interest at four percent (4%) per annum on the said total sum of $117,314.27, from the date of this decree until paid.

The court thus added to the authorized four percent interest which accrued between the time of the filing of the libel and the date of the final decree a further amount of four percent interest on the composite amount of interest and principal.[19] The effect of this

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[19] The propriety of an award of compound interest may be presented anew even if this Court should agree that the Government is entitled to a trial on its defensive plea. Respondent might prevail at trial. Guidance by this Court would thus serve a purpose.

compounding of interest is to exceed the statutory interest rate of four percent.

Immunity from payment of interest (except in just compensation cases) is an incident of the sovereignty of the United States; it can be waived only by Congress. *United States* v. *N. Y. Rayon Co.*, 329 U. S. 654, 660–661; *United States* v. *Goltra*, 312 U. S. 203, 207; *United States* v. *North Carolina*, 136 U. S. 211.[20] It is equally well settled that statutes which do waive attributes of sovereignty must be construed "strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U. S. 25, 27; see, also, *United States* v. *Michel*, 282 U. S. 656, 659–660; *United States* v. *Whited and Wheless*, 246 U. S. 552, 561.

The compounding of interest—unless there is explicit provision for doing so—is never favored, even as between private persons. *Cherokee Nation* v. *United States*, 270 U. S. 476, 490; *In re Realty Associates Securities Corporation*, 163 F. 2d 387, 392 (C. A. 2), certiorari denied, 332 U. S. 836.[21] *A fortiori*, statutes authorizing the award of interest against the United States are deemed to refer to simple interest only and not to warrant the award of compound interest. *Cherokee Nation* v. *United States*, 270 U. S. 476, 490–491; *Ute Indians* v. *United States*, 45 C. Cls.

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[20] Congress has not ordinarily allowed pre-judgment interest at all (see 28 U. S. C. 2411, 2516; 31 U. S. C., Supp. V, 724a; 46 U. S. C. 782), no less compound interest.

[21] "The general rule even as between private persons is that in the absence of a contract therefor or some statute, compound interest is not allowed to be computed upon a debt." *Cherokee Nation* v. *United States*, *supra*.

440, 470; *Menominee Tribe of Indians* v. *United States*, 97 C. Cls. 158, 162.[22]

The pertinent statutory provisions authorize the award of "interest at the rate of 4 per centum per annum until satisfied" and at no higher rate unless permitted by contract. They also provide that "[i]nterest shall run as ordered by the court" but not from a time prior to the filing of the libel. The court below apparently believed that the latter clause authorized the District Court to award compound interest. As we read the statute, the court is merely authorized to determine the date from which interest is to run and there is nothing to justify the compounding of interest.

We submit, therefore, that the District Court was without jurisdiction to compound the interest which accrued while the litigation was in progress. Its choice was to allow interest from the time of the filing of the libel or, as is more usual, from the time the final decree was entered.

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[22] *National Bulk Carriers* v. *United States*, 169 F. 2d 943, 951 (C. A. 3), cited in the opinion below (Appendix, *infra*, p. 44), deals with interest as an element of just compensation for the taking of property, a situation in which specific statutory authority for the award of interest is not deemed required. See *Jacobs* v. *United States*, 290 U. S. 13, 16.

## CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed with directions to remand the case for trial.

J. LEE RANKIN,
*Solicitor General.*
GEORGE COCHRAN DOUB,
*Assistant Attorney General.*
RALPH S. SPRITZER,
*Assistant to the Solicitor General.*
SAMUEL D. SLADE,
LEAVENWORTH COLBY,
SEYMOUR FARBER,
*Attorneys.*

DECEMBER 1958.

## APPENDIX

# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 5—October Term, 1957.

(Argued November 6, 1957 Decided May 6, 1958.)

Docket No. 24416

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GRACE LINE, INC., LIBELANT-APPELLEE,

*v.*

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT.

Before SWAN, MEDINA AND WATERMAN, *Circuit Judges*

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The United States appeals from a decree of the United States District Court for the Southern District of New York, in admiralty. William B. Herlands, *Judge*. Opinion below reported at 144 F. Supp. 548. Affirmed.

MEDINA, *Circuit Judge:*

In form the decree in admiralty from which the government appeals was entered *pro confesso* on motion of the libelant Grace Line, Inc., based upon exceptions and exceptive allegations addressed to the sufficiency of the answer, which asserted payment of the claim sued upon.

It is alleged in the libel that between December 31, 1954 and February 16, 1955 Grace carried six shipments of ore for the United States for which freight charges in the amount of $10,732.22 became due and

payable. The validity of this freight claim is not disputed. But the United States paid only $2,490.75, and the remaining $8,241.47, for which the judgment *pro confesso* was entered, was withheld and applied by the Comptroller General against the freight bill because of damages alleged to have been suffered by the United States in a wholly unrelated series of transactions, during the period from December 14, 1952 to April 6, 1953, in connection with which it is claimed that some of the goods transported by Grace were delivered in a damaged condition and some were lost.

The bills of lading under which the 1952–1953 shipments were made provided that "the Carrier shall be discharged from all liability in respect of * * * every claim whatsoever with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *." The bills also incorporated by reference the Carriage of Goods by Sea Act, 46 U. S. C. § 1301 *et seq.*, which includes a similar one year time bar. No judicial proceedings were instituted by the United States against Grace for the loss of, or damage to, the 1952–1953 shipments within the one year period.

Grace's libel in the court below claimed that freight was due under the 1954–1955 shipments, but made no mention of Grace's earlier transactions with the United States. The government's answer alleged, by way of set-off or defense, that Grace was indebted to the United States in an amount greater than that claimed in the libel because of its mishandling of the earlier shipments. Grace's exceptions to the sufficiency of this answer were sustained on the grounds: (1) that the government's claim based on the 1952–1953 shipments arose from a transaction unrelated to the libel and thus could not be made the subject

of a set-off in an admiralty proceeding; and also (2) that this earlier claim was time-barred.

On this appeal the government urges several grounds for reversal. Its first contention is that the Comptroller General's withholding and applying of funds due a creditor because of the creditor's alleged indebtedness to the United States results in the discharge of "mutual debts" and thus constitutes "payment"; and that an admiralty court must always consider payment as a defense to a libel. The government bases this argument on the provision in 31 U. S. C. § 71 that all claims by or against the United States "shall be settled and adjusted in the General Accounting Office," which it asserts is part of a "comprehensive statutory plan" made up of this and several other statutes, located in different parts of the United States Code,[1] authorizing the withholding of money by the Comptroller General whenever a creditor of the United States is also allegedly indebted to the United States.

The specific issue on this first phase of the case is: what did the Congress mean by 31 U. S. C. § 71, which provides: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." The question is one of statutory interpretation. We think it merely pricks the surface of the problem to dispose of the case by saying that it is absurd to suppose that the statute was intended to provide the government with a means of keeping stale claims alive indefinitely with respect to those

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[1] 5 U. S. C., § 46 (d) (Supp. III); 5 U. S. C. § 82; 31 U. S. C. § 227; 49 U. S. C. § 66.

having more or less continuous business relations with the United States.

The semantics of the government approach here is in terms of the defense of "payment." But the underlying thesis must be that the Congress intended to by-pass the process of adjudication and provided in lieu thereof a unilateral decision by the Comptroller General. We can find nothing in the statute to warrant any such inference. It is not provided that the withholding shall constitute payment or a discharge of the debt, nor does the general context, nor any word or phrase therein, indicate that the normal processes of adjudication are to be overridden. Indeed, there is no dispute about the right of the government to proceed, as it often does, to reduce its claim to judgment if it can. Moreover, in the view of the Comptroller General,[2] and under the cases,[3] the withholding by the Comptroller General is subject to judicial review; and no legislative history has been brought to our attention which supports the contention that administrative action by the Comptroller General in withholding money due to a creditor of the United States makes it unnecessary for the government to prove its claim on the merits, subject to such defenses as may exist in law or in fact, if it is to be applied against a claim of the creditor in settle-

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[2] Letter of the Comptroller General of the United States, 1954 U. S. Code Congressional and Administrative News, 2553, 2554.

[3] E. g., *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240. In *Munsey*, where the Supreme Court said that "(t)he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him,'" 332 U. S. at 239, it was considering the situation where the creditor's debt to the United States was not disputed, and it clearly recognized that such was the fact in the case then before it. 332 U. S. at 237, 240.

ment thereof. In other words, the attempted set-off must be a legally enforceable claim; and the fact that the Comptroller General has decided the claim in favor of the government *ex parte* by withholding the amount thereof from a payment justly due to a creditor of the United States neither constitutes a payment of and discharge of the debt nor does it stop the running of the applicable Statute of Limitations against the government claim in alleged satisfaction of which the Comptroller General takes this unilateral action. Here the period of limitations had plainly run.[4]

The statutory scheme, such as it is, constitutes no more than a method for co-ordinating the claims and debts of the various government departments and agencies.

The government cites Section 322 of the Transportation Act of 1940, 49 U. S. C. § 66, and its application in *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, recently decided by the Supreme Court, as part of the "comprehensive statutory plan" which, it argues, shows that Congress intended that unilateral witholding and applying by the Comptroller General was to constitute payment of a creditor's claim. Consideration of the *Western Pacific* case and 49 U. S. C. § 66 as applied therein, however, lends further support to our view, as expressed above, of the extent and effect of the Comptroller General's power to withhold and apply. In that case three railroads had carried shipments of bomb casings filled with napalm gel, which is inflammable but not self-igniting, for the United States. The railroads billed the United States at the highest, first-class, rates for "incendiary bombs" and the government paid the

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[4] *United States* v. *Seaboard Air Line Ry. Co.*, 4 Cir., 22 F. 2d 113. Compare 31 U. S. C. § 71, with 49 U. S. C. § 66.

bills of two of the railroads as presented. On post-audit, however, the General Accounting Office made deductions from subsequent bills of these two railroads on the grounds that the shipments of napalm gel should have been carried at the lower, fifth-class, rate. The General Accounting Office had acted pursuant to 49 U. S. C. § 66 which provides: "Payment for transportation of * * * property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." The railroads sued in the Court of Claims to recover the sums withheld from their subsequent bills and the government's defense rested on three contentions which went to the merits of the carriers' claim for payment of their subsequent bills. There was no contention that those bills had been "paid" by the withholding.

The statute on which the government relied in *Western Pacific* expressly reserved the right to the United States to deduct any overpayment from any subsequent bills, and this additional time was given to the government solely because the General Accounting Office was required to pay the carrier's bills "upon presentation * * *, prior to audit or settlement * * *." Of course, if the Comptroller General already had the power, under the previously enacted 31 U. S. C. § 71 and other statutes authorizing the withholding of money, to "pay" creditor's claims by merely unilaterally applying amounts allegedly due the United States, regardless of the nature of, or time limitation on, the government's claim, there would be

no need for the express reservation in the statute of the right to off-set claims of the United States against carriers' subsequent bills.

Thus it is abundantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States.[5]

Had we agreed with appellant's view that the period of limitations had not run against the government damage claim one might suppose, from the arguments advanced in appellant's brief, that it might be a hardship for the government to pay the Grace claim only to sue for the recovery of the same funds or a part thereof in an action against Grace on the damage claim. But the applicable procedure is clearly set forth in 31 U. S. C. § 227. Where a claim, such as the Grace claim for freight charges, is undisputed, the government may let the case proceed to judgment, after which Section 227 in terms provides that "it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt" due to the United States. In the event that the claimant does not acquiesce in the withholding but denies his indebtedness to the United States, Section 227 continues, "then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment," and "if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately com-

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[5] See also, *Climactic Rainwear, Inc.* v. *United States*, 115 Ct. Cl. 520.

menced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch."

Appellant also attacks the ruling of Judge Herlands to the effect that appellant's damage claim was unrelated to the claim for the unpaid balance of freight charges alleged in the libel and hence was not within the admiralty jurisdiction, which only extends to set-offs arising out of the same transaction as that on which the libel is based. But this is the well settled admiralty practice, as Supreme Court Admiralty Rule 50 and the Southern and Eastern District Court Admiralty Rules 16 and 17 implicitly require that the set-off arise out of the same transaction. We have repeatedly so held, and as recently as 1951. *Ozanic* v. *United States,* 188 F. 2d 228; *Castner, Curran & Bullitt, Inc.* v. *United States,* 5 F. 2d 214; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line,* 185 Fed. 386.

The first point made by appellant on this phase of the case need not long detain us. The substance of this point is that the real controversy between the parties was the damage claim which we have already determined was time barred, and that Grace has limited the government's assertion of this claim "by artificial methods of framing (its) * * * libel." In other words, although Grace has not received the balance due for its freight charges, and asserts in its libel only its claim for the payment of this balance, appellant argues that there is really no dispute about the validity of the claim for freight charges, that this is a purely fictitious issue and that the claim is made in admiralty to foreclose the assertion by appellant of its unrelated damage claim. But there is nothing in this, nor do the cases relied on by appellant so hold. In each of these cases the state of the pleadings was

such that the issues litigated and decided were properly before the court. *Kreitmeyer* v. *Baldwin Drainage District,* 2 F. Supp. 208, 210 (S. D. Fla.), aff'd *sub nom. Florida Nat'l Bank of Jacksonville* v. *Hemphill,* 5 Cir., 68 F. 2d 785; *Eastern Transportation Co.* v. *Blue Ridge Coal Co.,* 2 Cir. 159 F. 2d 642; *Alcoa Steamship* v. *United States,* 80 F. Supp. 158, rev'd, 2 Cir., 175 F. 2d 661, aff'd, 338 U. S. 421.

In the case at bar the subject-matter of the libel was the alleged debt of the United States to Grace arising out of the 1954–1955 shipments, and there is no relationship whatever between this claim asserted in the libel and the claim asserted by the government. No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure.

Appellant's other points are equally unpersuasive. It is idle to cite the numerous general statements in the authorities to the effect that admiralty practice is "nontechnical, flexible and plastic," and to emphasize the liberality of the Federal Rules of Civil Procedure and the modern tendency to discard procedural impediments to the administration of justice in the courts. There must be rules to govern such matters as joinder of parties and claims, set-offs, counterclaims and third party practice; and here we have a rule which has stood the test of time and has been applied again and again. We are not at liberty to disregard or overrule it.

Appellant also contends, in this connection, that, even if the admiralty rules prevent the pleading of unrelated set-offs, such a procedural limitation is overcome by the statutory plan which gives the General Accounting Office the "substantive right" to with-

hold and apply money due a creditor. This argument that the admiralty procedural rule deprives the government of a substantive right is untenable. The substantive right of the government in the case at bar is its claim for damages resulting from Grace's alleged mishandling of the 1952–1953 shipments. The admiralty rule respecting set-offs is merely part of a congeries of procedural provisions, including the statutes establishing the government's right to withhold and apply, which do not affect the substantive rights of the parties in the case at bar.

Appellant also argues that, even if the strict admiralty rule respecting set-offs is to be applied in this case, the 1952–1953 and 1954–1955 shipments were "merely fragments of a single vast overall transaction" between Grace and the United States. However, the only connection between the shipments during the two separate periods is that both were undertaken by the same shipper, Grace, and, in our view, this alone cannot bring the dealings within the concept of a single transaction. Thus we hold that the court below correctly sustained Grace's exception to the government's pleading of its unrelated set-off.

The final point with which we must deal is the trial court's award of interest at 4% per annum from the date of the decree until the decree is paid, on the composite amount of the sum sought in the libel plus interest at 4% per annum on this amount from the date of filing the libel until the date of the decree. Appellant argues that the court below lacked the power to award this "compound interest." However, Section 3 of the Suits in Admiralty Act, 46 U. S. C. § 743 provides that "* * * when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied * * *" may be included in the decree against the United States, and that

"(i)nterest shall run as ordered by the court * * *" There is no showing that the discretion vested in the trial court was abused by the decree in the case at bar. See *National Bulk Carriers* v. *United States,* 3 Cir., 169 F. 2d 943, 951.

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur with the majority in affirming the judgment of the District Court. I disagree with my colleagues, however, in their characterization of the Government's position with respect to the defense of "payment." I do not understand the Government to argue that the "withholding and applying" procedure which it contends is authorized by 31 U. S. C. § 71 "makes it unnecessary for the Government to prove its claim on the merits * * *" I understand the Government's position to be that the merits of its claim may be adjudicated by a court of competent jurisdiction in an action brought by Grace Line to recover for the alleged wrongful withholding and that the Government does not intend to "by-pass the process of adjudication." Consistent with the position I understand the Government to have taken here, I note that in the case of *Isbrandtsen Company, Inc.* v. *United States,* the United States does not deny that the validity of its claim against Isbrandtsen is raised by Isbrandtsen's libel to recover amounts the Government had withheld and applied upon the claim.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

ISTHMIAN STEAMSHIP COMPANY,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLEMENT C. RINEHART,
*Counsel for Respondent,*
Post Office Address:
120 Broadway,
New York 5, New York.

WALTER P. HICKEY,
Of Counsel.

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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
*v.*
ISTHMIAN STEAMSHIP COMPANY,
Respondent.

October Term, 1958, No. 285

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE.

None of the facts and issues in this simple admiralty suit presents any question whatever meriting review by this Court. The decisions below do not raise any novel or important federal question which this Court should decide nor do they conflict in any respect with the decisions of this Court or other federal courts. On the contrary, the opinions of the District Court (134 F. Supp. 854) and of the Court of Appeals (225 F.(2) 816) merely followed established rules of admiralty practice and the express requirement of the Suits in Admiralty Act (46 U. S. C. Sec. 741, *et seq.*) pursuant to the authority of which this suit was brought against the United States.

The suit was brought to recover $115,203.76, the unpaid balance of ocean freight which the respondent had admittedly earned. The freight was earned by the carriage and delivery of cargo shipped by the United States in 1953 upon respondent's steamer *Steel Worker* pursuant to a

bill of lading. That was the only contract or transaction pleaded in the libel. (App.[1] pp. 3a-4a)

The answer of the United States admitted that it had become obligated to respondent for the freight.[2] (See the Third Articles of the Libel and Answer, App. pp. 3a, 4a, 5a).

The sole defense pleaded in the answer was a counterclaim[3] alleged to have arisen from a contract wholly unrelated to the one set forth in the libel. (App. pp. 5a-9a). The counterclaim was upon two bareboat charters made in 1946. It claimed $115,203.76 in additional charter hire said to have accrued during the years 1946-48 for respondent's use of seven government-owned vessels, none of which was the *Steel Worker*.

Exceptions to petitioner's counterclaim were duly taken by respondent on the ground that admiralty practice does not permit a set-off or counterclaim unless it arises out of the contract, cause of action or transaction pleaded in the libel. (App. p. 15a). That rule of admiralty practice has long existed and been followed uniformly as the court rules and decisions hereinafter cited will show.

Respondent's exceptions were sustained by Judge Dimmock in the District Court (134 F. Supp. 854; App. 17a-21a). As no defense to the libel remained, the Court

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[1] Page references preceded by "App." are to the Appendix to petitioner's brief in the Court of Appeals, which has been filed in this Court.

[2] The petition also describes respondent's claim variously as one which the United States "admittedly owes", or as "admittedly due" or "a debt owed" or an "uncontested claim" or as "undisputed". (Petition, pp. 2, 7, 9, 10, 12).

[3] Three weeks before filing the answer in this suit, the United States had brought a separate suit in admiralty against respondent (bearing Docket No. A 185-274 in the United States District Court, Southern District of New York) wherein the sole cause of action alleged was identical with the cause of action pleaded as a counterclaim in this suit. Respondent has filed an answer denying its liability, respondent has been examined before trial, and the suit is at issue awaiting trial.

granted respondent a decree *pro confesso* for the principal amount, together with costs and interest at 4% from the date when the libel was filed. The total indebtedness fixed by the decree was the sum of those three items, amounting to $117,314.27. (App. 23a). In accordance with usual practice and with Section 743 of the Suits in Admiralty Act (46 U. S. C. 743) the decree included interest at the rate of 4% per annum on the total amount of the decree from the date of the decree until paid.

Upon petitioner's appeal, the decree of the District Court was unanimously affirmed. (225 F. (2d) 816; Petition, pp. 18-19). The short affirming opinion of the Court of Appeals, Second Circuit, adopted the Court's reasoning in the companion case of *Grace Line, Inc.* v. *United States*, 225 F. (2d) 810.

## Statute Involved.

The petition fails to quote all the portions of Section 3 (Sec. 743) of the Suits in Admiralty Act (approved Mar. 9, 1920), which in this case involves. The following are the material portions, (41 Stat. 526; 46 U. S. C., Sec. 743, emphasis ours):

> "**That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree** against the United States or such corporation **may include** costs of suit, and **when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied,** or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction * * *."

## ARGUMENT.

### I.

PETITIONER'S COUNTERCLAIM COULD NOT BE MAINTAINED IN THIS SUIT BECAUSE THE SUITS IN ADMIRALTY ACT REQUIRES OBSERVANCE OF THE ADMIRALTY RULE FORBIDDING SET-OFFS OR COUNTERCLAIMS UNRELATED TO THE SUBJECT MATTER OF THE LIBEL.

The petition does not deny that if this were a case between private parties, the petitioner's counterclaim could not be maintained because it is upon a cause of action unrelated to the subject matter of the libel and, therefore, forbidden by a long-established rule of admiralty practice.

Among the many decisions uniformly applying that rule of admiralty practice, both in private and government cases, are the following: *Ozanic* v. *United States*, 1951, C. C. A. 2, 188 F. (2) 229; *Castner, Curran & Bullitt, Inc.* v. *United States*, 1925, C. C. A. 2, 5 F. (2d) 214; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line*, (S. D. N. Y.) 180 F. 902, aff. 185 F. 386; *Susquehanna S. S. Co.* v. *A. O. Anderson & Co.*, 1925, C. C. A. 4, 6 F. (2d) 858; *The Jane Palmer*, S. D. N. Y., 270 F. 609; *Tice Towing Line* v. *United States Lighterage Corporation*, E. D. N. Y., 1932 A. M. C. 794; *The Yankee*, E. D. N. Y., 37 F. Supp. 512; *Hildebrand* v. *Geneva Mill Co.*, 1929, (M. D. Ala.) 32 F. (2d) 343; *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, C. C. A. 1, 116 Fed. 857; *Anderson* v. *Pacific Coast Co.* (N. D. Cal.) 99 F. 109; *Howard* v. *9889 Bags of Malt*, (D. C. Mass.) 255 F. 917; *Rodgers Sand Co.* v. *Monongahela & Ohio Dredging Co.*, C. C. A. 3, 296 F. 919.

Recognition of that rule of admiralty practice also appears in Rule 50 of the general rules promulgated by the Supreme Court for Admiralty Practice in the Courts of the

United States (28 U. S. C. A. following Section 723) and Rules 16 and 17 of the admiralty rules of the Southern and Eastern Districts of New York. The text of the pertinent parts of those rules is printed as an Appendix to this brief.

The foregoing rule being unquestionably among "the rules of practice obtaining in like cases between private parties," its application to this case by the courts below was mandatory because of the first sentence of Sec. 3 of the Suits in Admiralty Act, already quoted.

Somewhat disingenuously, petitioner's argument ignores that statutory requirement. In fact, the petition invites this Court to except government answers in admiralty from the established rule of practice, notwithstanding the statute, by allowing the government to interpose a set-off or counterclaim unrelated to the subject matter of the libel.

Not only is such an exception forbidden by statute but also there is no sound reason for making such an exception, as the further points of argument will show.

## II.

### A SPECIAL RULE PERMITTING SET-OFF OF UNRELATED GOVERNMENT CLAIMS IN ADMIRALTY IS WHOLLY UNNECESSARY FOR THE FULL PROTECTION OF THE GOVERNMENT'S INTERESTS.

In 31 U. S. C. Sec. 227,[4] Congress has specified the withholding or set-off procedure to be followed by the

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[4] Section 227 of Title 31 reads (italics ours):

> "When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such

General Accounting Office in cases where judgment is recovered against the United States and the judgment creditor owes an indebtedness to the United States or is claimed to be so indebted.

In such cases, if the judgment creditor denies his indebtedness, the United States must prosecute suit against the judgment creditor to establish the disputed claim. If the United States fails to establish its claim or fails to establish it in full, the judgment creditor is entitled to the amount wrongfully withheld *together with interest thereon.*

This procedure fully protects the United States and, at the same time, gives the judgment creditor some measure of redress, by way of interest, when the government's set-off is unfounded.

In the instant case, the United States has already instituted a separate suit in admiralty on its disputed claim (See Note 3, *supra*). Therefore, in order to protect the United States fully, the General Accounting Office needs

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plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. *And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.* Mar. 3, 1875, c. 149, 18 Stat. 481; Mar. 3, 1933, c. 212, Title 11, §13, 47 Stat. 1516."

only to follow the other steps specified in 31 U. S. C. Sec. 227.

No reason appears why the United States would suffer any prejudice or disadvantage whatever by prosecuting its disputed claim in the pending separate suit rather than as a set-off to respondent's undisputed claim.

Petitioner's contention that such a set-off is an incident of so-called "administrative recoupment" pursuant to 31 U. S. C. Sec. 71, will not bear analysis, as the next point of argument shows.

## III.

ENFORCEMENT OF THE ADMIRALTY RULE PROHIBITING UNRELATED SET-OFFS DOES NOT IN ANY RESPECT CONFLICT WITH THE FULL EXERCISE OF THE AUTHORITY CONFERRED UPON THE GENERAL ACCOUNTING OFFICE BY 31 U. S. C. SEC. 71, TO SETTLE AND ADJUST CLAIMS BY OR AGAINST THE UNITED STATES.

Congress gave originally that identical authority to the Accounting Officers of the Treasury in 1817 (3 Stat. 366) and merely transferred it to the General Accounting Office when that agency was formed in 1921.

Nothing in the statute confers or purports to confer power upon government accounting officers to make a binding determination of any claim by or against the United States without the consent of the debtor or creditor, as the case may be.

The term "administrative recoupment" used in the petition is merely one way of describing a frequent occurrence both in government and private business. Many debtors will not pay a debt if the debtor has or purports to have a claim against the other party. In such a case the debtor may prefer to treat his debt as a credit against his own claim.

At common law, such unilateral action by one party does not discharge, extinguish or diminish either of the cross-debts. That may only be done by agreement of the parties or by judicial action. (*Williston on Contracts*, Rev. Ed., Sec. 887e).

Sec. 71 of Title 31 does not prescribe any different rule. As the Court of Appeals said and the petitioner admits (p. 10), there is nothing in the statute to warrant the inference that "the Congress intended to by-pass the process of adjudication and provided in lieu thereof a unilateral decision by the Comptroller General".[5]

Consequently respondent's right to maintain the cause of action set forth in the libel remained unimpaired, notwithstanding the refusal of payment by the General Accounting Office because of its off-set of the unrelated and disputed claim of the United States against respondent which subsequently was pleaded in petitioner's answer to the libel.

Those undeniable facts dispose of the petitioner's first two arguments (Petition, pp. 8-11).

The petitioner's refusal to pay respondent's claim could not possibly afford support to petitioner's contention that it had paid respondent's claim by the set-off and that petitioner's defense of set-off was really one of payment.[6] As the Court of Appeals said: "* * * it is abun-

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[5] This and subsequent quotations are from the opinion of the Court of Appeals in *Grace Line* v. *United States*, 225 F. (2d) 810, 812, the reasoning of which was adopted by that Court in this case.

[6] Petitioner's allegations in its pending separate suit (See note 3, *supra*) upon its counterclaim are directly contrary to its present characterization of the counterclaim in this suit as equivalent to a plea of payment of respondent's claim.

In article NINTH of the libel in A 185-274, the Government expressly alleged:

> "Although duly demanded no part of said sum of $115,203.76 has been paid and there is now due and owing

dantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States." (Petition, p. 27; 225 F. (2d) 814).

Petitioner's second argument (p. 10)—that the subject matter of respondent's suit was "review of the government's act of recoupment"—hardly deserves mention.

Respondent had no cause of action upon which to invoke the jurisdiction of the District Court under the Suits in Admiralty Act except respondent's affirmative claim which petitioner had refused to pay. Respondent could not possibly have a cause of action upon its own disputed and unpaid obligation to petitioner.

As the Court of Appeals said: "No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure" (Petition, p. 29; 225 F. (2d) 815).

## IV.

PETITIONER'S CONTENTION (PP. 11-13) THAT THE ADMIRALTY RULE AGAINST UNRELATED SET-OFF SHOULD BE MODIFIED IS NOT AN ARGUMENT OPEN TO PETITIONER IN THIS CASE, EVEN IF THE RESTRICTED JURISDICTION OF THE ADMIRALTY COURTS AND OTHER CONSIDERATIONS DID NOT ALSO MAKE THE PETITIONER'S CONTENTION UNSOUND.

The admiralty rule unquestionably exists and Section 3 of the Suits in Admiralty Act (46 U. S. C. 743) requires that it be observed.

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to libelant from the respondent the sum of $115,203.76 with interest thereon from July 31, 1948."

As Judge Dimock said (App. p. 20a):

"If it [the government] paid the freight it did so by cancelling its claim against Isthmian for charter hire. Suit for the charter hire is completely inconsistent with any such cancellation."

Moreover, notwithstanding petitioner's implication to the contrary, (petition pp. 11-13) the result achieved in this suit is quite compatible with the result that would have been obtainable if the Federal Rules of Civil Procedure had been applicable. Rule 42(b) permits separate trial of any claim, cross-claim, counter-claim or third-party claim. Rule 54(b) permits entry of final judgment upon a claim, cross-claim, counter-claim or third-party claim in an action before the remaining claims in the action have been adjudicated. Rule 62(h) permits a stay of such a final judgment, however, when a stay is appropriate.

In substance, that is the result which has been accomplished in this case. Final judgment upon the respondent's undisputed claim has been entered and the suit upon the petitioner's disputed claim is to be separately tried and adjudicated. Meanwhile, collection of respondent's judgment can be stayed, in effect, by the procedure prescribed in Section 227 of Title 31, U. S. C.

## V.

PETITIONER'S ASSERTION THAT THE DECREE ALLOWED "COMPOUND INTEREST" AGAINST THE UNITED STATES AND SO WAS UNAUTHORIZED BY THE SUITS IN ADMIRALTY ACT, IS UNFOUNDED.

As the decree was "for a money judgment", Sec. 3 of the Suits in Admiralty Act, (46 U. S. C. Sec. 743, quoted *supra*) expressly authorized the inclusion of "interest at the rate of 4 per centum per annum until satisfied."

The interest authorized was obviously interest upon the entire judgment debt "until satisfied". The full amount of the decree became due and owing as a single judgment debt upon entry of the decree. The principal amount of respond-

ent's claim, interest to the date of the decree and costs of suit were all merged into the single judgment debt and ceased to exist otherwise. (*Morley* v. *Lake Shore R. Co.*, 146 U. S. 162, 168).

In cases where the judgment debtor is a private person and unsuccessfully appeals instead of paying the judgment debt, he becomes liable for interest on the full amount of the judgment until it is paid. That does not constitute the award of "compound interest" in any real sense. After the judgment, only the judgment debt exists.

Nothing in the Suits in Admiralty Act limits the award of interest in the decree to interest on the principal amount of the claim. Therefore, Sec. 3 of the Act makes the same rule that is applicable in suits between private parties, likewise applicable in this suit. It was so held in *National Bulk Carriers* v. *United States*, 3 Cir., 169 F.(2d) 943, 941, which was a suit governed by the Suits in Admiralty Act.

## VI.

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

New York, New York,
September 18, 1958.

Respectfully submitted,

CLEMENT C. RINEHART,
Counsel for Respondent,
120 Broadway,
New York 5, New York

WALTER P. HICKEY,
Of Counsel.

## APPENDIX.

(See p. 5.)

I. Rule 50 of "The Rules of Practice in Admiralty and Maritime Cases", promulgated by The Supreme Court of the United States, Dec. 6, 1920 (28 U. S. C. A. "Rules" Volume) (emphasis ours):

> "*Security on cross-libel.* Whenever a cross-libel is filed upon *any counterclaim arising out of the same contract or cause of action for which the original libel was filed,* and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security * * *."

II. Admiralty Rules of the United States District Courts for the Eastern and Southern Districts of New York (emphasis ours):

> "Rule 16: *Recoupment and Cross-Libel.* If a respondent or claimant shall desire to recoup or set off any damages sustained by him *growing out of the transactions referred to in the libel,* he must in his answer state the facts and his own damages in like manner as upon filing a cross-libel * * *. He shall not, however, be entitled to any affirmative recovery upon such answer. In any case where a cross-libel *in personam* will lie, service of such cross-libel may be made on the proctors for the libellant.
>
> "Rule 17. *Cross-claim against Co-Respondent or Claimant.* A respondent or claimant may, by petition or pleading, state a claim, *arising out of the transaction, occurrence or property that is the subject matter of the original cause,* against a co-party who has appeared or claimed in the suit. * * *"

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

ISTHMIAN STEAMSHIP COMPANY,
*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

## BRIEF FOR RESPONDENT.

CLEMENT C. RINEHART,
*Counsel for Respondent,*
Post Office Address:
120 Broadway,
New York 5, New York.

WALTER P. HICKEY,
*Of Counsel.*

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## BRIEF FOR RESPONDENT.

Certiorari was granted in this case (R. 26) to review an order of the United States Court of Appeals, Second Circuit, (R. 25) affirming a final decree of the United States District Court for the Southern District of New York, in admiralty, for $117,314.27 recovered by respondent against the United States (R. 21) upon an admitted claim for maritime freight (R. 3-5). The suit was brought pursuant to the Suits in Admiralty Act (46 U. S. C. 741-752). (R. 3).

The District Court held that the sole defense pleaded in the answer of the United States—i.e., an attempted set-off against the libelant of a disputed claim wholly unrelated to the subject matter of the libel—was not cognizable in admiralty. (R. 16-19)

### QUESTION PRESENTED.

The brief for the United States fails to mention the single basic question presented for review.

Broadly stated, the basic question is whether the express requirement of the Suits in Admiralty Act, that suits brought pursuant thereto against the United States "shall proceed and shall be heard and determined accord-

ing to the principles of law and to the rules of practice obtaining in like cases between private parties", is subject to exceptions which do not appear in the terms of the Act.

The foregoing question was presented in two specific ways:

(1) The courts below held that the United States may not prevent a libelant from recovering a decree upon an admitted claim, by pleading a set-off of an unrelated claim which could not be maintained as a set-off under the rules of practice applicable in admiralty suits between private parties.

(2) In accordance with the law and practice obtaining in suits between private parties, the courts below awarded respondent interest (at the rate provided in the Act) upon the whole amount of the judgment debt stated in the final decree whereas the United States claimed that interest should not run upon that portion of the total recovery which represented: (a) interest on the principal amount of the debt from the filing of the libel to the date of the decree and (b) the costs of suit.

## STATUTES INVOLVED.

1. The statute directly involved is the *Suits in Admiralty Act*, (Act of March 9, 1920, Ch. 95; 41 Stat. 525, 46 U. S. C. Secs. 741-752). As the brief for the United States omits the portion of Sec. 3 (46 U. S. C. Sec. 743) upon which the basic question in this case turns, the material portions are quoted below (emphasis ours):

> "**That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree** against the United States or such corporation **may include** costs of suit,

and **when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied,** or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. **Interest shall run as ordered by the court.** Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction * * *."

2. The brief for the United States cites (p. 13, n.) but fails to quote the statute which expressly prescribes the withholding or set-off procedure to be followed by the General Accounting Office in cases, such as the present one, where judgment is recovered against the United States by a judgment creditor who is alleged to be indebted to the United States in a separate transaction. Such procedure appears in 31 U. S. C. Section 227 (Act of March 3, 1875, 18 Stat. 481; Act of March 3, 1933, 47 Stat. 1516) which reads as follows (emphasis ours):

"When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judg-

ment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. *And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.*"

3. The pertinent general rules of admiralty practice prescribed by this Court for the district courts and the rules of the District Court below regarding set-offs in admiralty are quoted in the brief for the United States (pp. 3-5) but there is no citation or quotation of the statutory provisions which give those rules effect and preclude any exception or amendment to such rules being made merely for the purpose of this suit or otherwise than by the procedure specified by statute. The two statutory provisions in question are Sections 2071 and 2073 of Title 28, United States Code (as amended by the Act of May 24, 1949, c. 139, Sec. 104, 63 Stat. 104 and by Act of May 10, 1950, c. 174, Sec. 3, 64 Stat. 158), which read as follows:

"§2071. Rule-making power generally

"Each court established pursuant to Act of Congress may from time to time prescribe rules for the conduct of its business. Such rules shall be consistent with Acts of Congress and rules prescribed by the Supreme Court."

• • • • • •

"§2073. Admiralty rules for district courts

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure in admiralty and maritime cases in the district courts of the United States and all courts exercising admiralty jurisdiction in the Territories and Possessions of the United States.

"Such rules shall not abridge or modify any substantive right.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way, limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

## Statement of the Case.

The statement of the case in the brief for the United States (pp. 5-9) omits certain material facts.

1. No reference is made to the article of the answer (Article 3) by which the government admitted its obligation to libelant [respondent in this court] for the freight which the libel was filed to recover. The freight was earned by transportation of military cargo shipped in 1953 by the Military Sea Transportation Service aboard respondent's *S.S. Steel Worker* (R. 5).

Elsewhere in the brief, however, there are repeated admissions[1] that the freight was admittedly owed, although such admissions are usually coupled with contentions that the freight had been "paid" by the act of the General Accounting Office in withholding payment because of a disputed claim of the Maritime Administration against respondent under an entirely different and unrelated contract which had terminated in 1948.

2. Other material facts which are omitted show the untenability of the government's contention "that the government's defense of withholding and applying is in the nature of a plea of payment" (p. 12).

(a) No statement appears of the grounds of the decision of the Court of Claims which dismissed, for lack of jurisdiction, the suit which respondent initially brought, through other counsel, in that Court to recover its freight.

The opinion of the Court of Claims (131 C. Cls. 472) expressly states that Isthmian's [respondent's] suit there was upon the common law counts of "money had and received by defendant for plaintiff's use or on an account stated" (131 C. Cls. at 473). It was held that neither count was maintainable because an implied promise to pay was an essential element of both counts whereas "instead of a promise, there has been a refusal to pay." The Court of Claims held, therefore, that Isthmian's claim was for freight money which "defendant refuses to pay" notwithstanding "that defendant admits liability" (131 C. Cls. at 473). Consequently, Isthmian's claim was held to be maritime and,

[1] The brief for the United States variously refers to respondent's freight claim as one which the government "admittedly owes" (p. 2) or as a "freight bill" the "correctness" of which is conceded (p. 9) or as an "admitted debt" (p. 10) or as "money which it [the government] admittedly owes" (pp. 11, 15) or as "the claimant's uncontested claim" (p. 16).

therefore, within the exclusive jurisdiction of the district courts in admiralty. *Johnson* v. *Fleet Corp.*, 280 U. S. 320.

Petitioner's brief erroneously implies (p. 6) that the Court of Claims "agreed" that the subject matter of the suit was "either Isthmian's claim for maritime freight or the Government's claim for additional charter hire." No reference to the government's claim for charter hire appears in the opinion of the Court of Claims.

(b) The brief for the United States admits (p. 7) that, before filing its answer in this case, the government had begun **a separate suit** in admiralty in the District Court against Isthmian [respondent] **for recovery of the identical $115,203.76 in additional charter hire** which it attempted to assert as a set-off in this suit (R. 10-12).

No mention is made, however, of the government's allegation in Article Ninth of its libel in that suit that "**although duly demanded, no part of said sum of $115,203.76 has been paid and there is now due and owing to libelant from the respondent the sum of $115,203.76** with interest thereon from July 1, 1948" (Emphasis ours).

No mention is made, either, of the fact that the independent suit is pending at issue in the District Court and, if tried, will determine the merits of the disputed claim which the government attempted to set-off in this suit. The case has been kept off the trial calendar by the government, however, pending the outcome of the present suit.

## SUMMARY OF ARGUMENT.

### I.

This case is governed by the requirement of Section 3 of the Suits in Admiralty Act (46 U. S. C. 743) that suits under the Act shall be determined "according to the principles of law and to the rules of practice obtaining in like cases between private parties".

As respondent's libel was brought under the authority of the Act, the United States was not entitled to assert any set-off or other defense which would not be permissible under the rules of practice applicable in suits between private parties.

Those rules precluded the United States from asserting a set-off based wholly on a claim of the United States against respondent unrelated to the contract or transaction upon which respondent's libel was based.

That rule of admiralty practice has uniformly obtained in all the maritime circuits and is recognized in the admiralty rules of practice promulgated by this Court and by the District Court.

Historically, the admiralty set-off rule approximates the common law rule prior to the enactment of the statutes extending the scope of set-offs in actions at law. Admiralty practice was never changed by statute or by general rule having statutory force as occurred in respect of suits in equity and subsequently under Rule 13 of the rules of civil practice.

Various sound reasons exist why the scope of admiralty set-offs should not be extended and are indicated at pages 15-16, *infra*. The merits or demerits of the admiralty rule are immaterial in this case, however, because the existing rule governs and may only be changed by an exercise of the statutory rule-making power of this Court, exercised in the manner provided in 28 U. S. C. 2073.

The second point of petitioner's brief (pp. 21-29) does not seriously challenge the existence of the admiralty rule against unrelated set-offs but consists, in effect, of a plea that the requirements of the Suits in Admiralty Act and of the admiralty rule should be disregarded and a special exception to the rule should be made for the purpose of government cases.

The decisions and authorities cited in the second point of petitioner's brief are, necessarily, immaterial because they relate only to the contention that the existing admiralty rule on set-offs should be changed.

II.

Respondent's second point shows that enforcement of the admiralty rule prohibiting unrelated set-offs, cannot prejudice the interests of the United States. In fact, Congress has specified in 31 U. S. C. 227, the procedure to be followed in cases where judgment is recovered against the United States by a judgment creditor who owes or is claimed to owe money to the United States.

III.

The attempt in point I of the petitioner's brief to avoid the admiralty set-off rule cannot be maintained because it depends on two fictitious contentions, that: (A) the petitioner's set-off was a plea of "payment"; or (B) the set-off was "the real subject matter of the suit".

A. Instead of alleging payment of respondent's claim, the government's attempted set-off showed that the government refused to pay respondent's claim because of the government's disputed claim against respondent. The withholding of payment did not and could not constitutionally discharge or satisfy the debt of the United States to the respondent and, therefore, could not constitute a payment.

The rights of the parties remain exactly as they were before the withholding occurred.

The decisions cited in the brief for the United States are not in point.

B. The contention of the United States that the set-off was "the real subject matter" of the litigation is palpably wrong because it assumes the conclusion which it purports to establish. It assumes that the set-off constituted an "affirmative defense" which presented issues to be decided in this litigation. In fact, however, the set-off of an unrelated claim was improper under admiralty practice and, therefore, could not constitute an affirmative defense or raise any issues in the case.

Other reasons why the contention is unfounded are set forth on pages 30-32, *infra*.

None of the cases cited in petitioner's brief (pp. 15-21) support its contention on this point.

## IV.

The government's objection to the decree as an allowance of "compound interest" is unfounded. The interest allowed was expressly authorized by Section 3 of the Suits in Admiralty Act and was in accordance with the practice obtaining in suits in admiralty between private parties. Moreover, the decree only allowed simple interest and not compound interest as petitioner claims.

A similar decree against the United States under the Suits in Admiralty Act was expressly upheld in *National Bulk Carriers, Inc.* v. *United States*, 169 F. (2d) 943, 951.

# ARGUMENT.

## FIRST POINT.

PETITIONER'S ATTEMPTED SET-OFF OF A CLAIM UNRELATED TO THE SUBJECT MATTER OF THE LIBEL, WAS IMPROPER BECAUSE THE SUITS IN ADMIRALTY ACT REQUIRES OBSERVANCE OF THE ADMIRALTY RULE FORBIDDING SUCH SET-OFFS.

Somewhat disingenuously, the brief for the United States does not even mention the express requirement of the first sentence of Section 3 of the Suits in Admiralty Act, (quoted *supra*, p. 2), that suits under the Act shall proceed and be determined **"according to the principles of law and to the rules of practice obtaining in like cases between private parties"**.

Disregarding that requirement of the Act, the petitioner's brief asks this Court, in effect, to exempt the United States from the established admiralty rule which forbids set-offs of claims unrelated to the subject matter of the libel. The two alternative and untenable grounds upon which petitioner's request is based will be discussed in the Third Point of this brief.

Under its first point of argument, respondent will show that the rule of practice against unrelated set-offs has existed in the admiralty courts of the United States from the outset and that there are sound reasons for it. Respondent will further show that the rule has the force of law and is applicable to private parties and the government alike and may not be changed except in the manner provided by statute.

The first reported statement of the admiralty rule against unrelated set-offs appears to be by Story, C. J., in *Willard* v. *Dorr*, 1823, C. C., Mass., 3 Mason 161; 29 Fed.

Cas. No. 17,680. That was a suit in admiralty against a shipowner for the wages of a shipmaster upon a voyage from Boston to China during which the vessel was captured and sold as prize. The shipowner's answer pleaded certain set-offs. Some of the set-offs were for partial payments of wages and were allowed. Other set-offs were claimed, however, for "debts and claims of a wholly independent nature" and those were disallowed. Judge Story's remarks on the subject were as follows (29 Fed. Cas. p. 1280):

> "* * * Now in respect to the latter, [debts and claims of a wholly independent nature] I am utterly at a loss to know, how they can be properly brought within the cognizance of this court. Most of them are not of a maritime nature; and even if they were, as they do not grow out of the maritime contract, on which the libel is framed, it is difficult to perceive, how they are founded in point of jurisdiction. Courts of admiralty are not invested by statute with any authority to hold plea of set-offs generally. Wherever they do entertain such claims, it is upon general principles of equity, where the claims attach to the particular maritime demand, submitted to their cognizance by the libel, and not upon any notion of a right to enforce such set-offs, as are now recognized and enforced in courts of common law under statuteable provisions. The set-offs allowed in the admiralty are principally those, in which advances have been made upon the credit of the particular debt or demand, for which the plaintiff sues; or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence; or as restitution in value for damages sustained in consequence of gross violations of the contract for such services. The duty of the court is clear, therefore, and it ought not to entertain any jurisdiction over such set-offs."

The rule recognized by Judge Story in *Willard* v. *Dorr*, *supra*, has been applied uniformly in all the circuits in which admiralty cases are most frequently heard. A collection of thirty-one reported decisions applying the rule appears in the margin.[2] We have marked with an asterisk the decisions in the foregoing collection where the admiralty courts declined to permit a respondent to set-off a claim arising under a different contract from the one upon which the libel was based.

Further recognition of the admiralty rule against set-offs of unrelated claims appears in the various Court rules which are quoted at pages 3-5 of the brief for the United States.

Rule 50 of the Rules of Practice promulgated by this Court on December 6, 1920 (245 U. S., appendix), for "the

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[2] First Circuit: **Willard* v. *Dorr*, 1823, C. C. Mass. (Story, J.), 3 Mason 161, 29 Fed. Cas. No. 17680; *Dexter* v. *Munroe*, 1861, 2 Spr. 39; 7 Fed. Cas. No. 3863; *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency*, 1902, 116 F. 857; *Howard* v. *9889 Bags of Malt*, 1919, 255 F. 917.

Second Circuit: *The Hudson*, 1846, Olc. 396, 12 Fed. Cas. No. 6831; **Emery* v. *Tweedie Trading Co.*, 1905, 143 F. 144; **The Oceano*, 1906, 148 F. 131; **Roney* v. *Chase, Talbott & Co.*, 1907, 160 F. 268 (rev. on other grounds, 161 F. 309); *McCaldin Bros.* v. *Donald S. S. Co.*, 1907, 169 F. 992; **United Trans. Co.* v. *N. Y. & Baltimore S. S. Co.*, 1910, 180 F. 902, aff. 185 F. 386; **The Jane Palmer*, 1920, 270 F. 609; *Castner, Curran & Bullitt, Inc.* v. *United States*, 1925, C. C. A. 2, 5 F. (2d) 214; **The Yankee*, 1941 37 F. Supp. 512; *Cioffi* v. *New Zealand Shipping Co.*, 1947, 73 F. Supp. 1015; *Ozanic* v. *United States*, 1951, C. C. A. 2, 188 F. (2d) 228.

Third Circuit: *Bains* v. *The James and Catherine*, 1832, Baldw. 544, 2 Fed. Cas. No. 756; *Crowell* v. *The Theresa Wolf*, 1880, 4 F. 152; **The Zouave*, 1886, 29 F. 296; *The Frank Gilmore*, 1896, 73 F. 686; *The Leader*, 1910, 181 F. 743, 746 (rev. on other grounds, 187 F. 807); **Rogers Sand Co.* v. *Monongahela & Ohio Dredging Co.*, 1924, C. C. A. 3, 296 F. 919; *The Kearney*, 1926, C. C. A. 3, 14 F. (2d) 949.

Fourth Circuit: *O'Brien* v. *1614 Bags of Guano*, 1882, 48 F. 726; **Susquehanna S. S. Co.* v. *Anderson*, 1925, C. C. A. 4, 6 F. (2d) 858.

Courts of the United States in Admiralty and Maritime Jurisdiction", deals with the furnishing of security for a counterclaim **"arising out of the same contract or cause of action for which the original libel was filed."**

Rule 16 of the Admiralty Rules of the United States District Courts for the Southern and Eastern Districts of New York provides that the answer of a respondent or claimant may ask recoupment or set-off of damages **"growing out of the transactions referred to in the libel."** Rule 17 of the same district courts gives respondents and claimants a like privilege to assert against a co-party, a claim **"arising out of the transaction, occurrence or property that is the subject matter of the original cause."**

Contrary to the suggestion in petitioner's brief (p. 23), the foregoing decisions and court rules do not represent a "narrowing" of the scope of set-off and counterclaim in admiralty.

Historically, the right of a defendant to set off independent claims against the plaintiff was the creature of statute. *Stoqk* v. *Taylor* (1880), 5 Q. B. D. 569, 575. Until 2 Geo. II c. 22, Sec. 13 and 8 Geo. II c. 24, Sec. 4 were enacted in 1728 and 1734, respectively, the common law did not permit such set-offs. *United States* v. *Eckford*, 6 Wall.

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FIFTH CIRCUIT: *Southwestern Trans. Co.* v. *Pittsburgh Coal Co.*, 1890, 42 F. 920; **Hildebrand* v. *Geneva Mill Co.*, 1929, 32 F. (2d) 343; **Koch, Ellis Co.* v. *Phillips Petroleum Co.*, 1955, 219 F. (2d) 520.

SIXTH CIRCUIT: **The Two Brothers*, 1880, 4 F. 158; *The Donald T. Wright*, 1939, 30 F. Supp. 610.

NINTH CIRCUIT: *The Ping On.* v. *Blethen*, 1882, 11 F. 607; **Anderson* v. *Pacific Coast Co.*, 1900, 99 F. 109.

See also: *Armour & Co.* v. *Ft. Morgan S. S. Co.*, 1926, 270 U. S. 253 at 259 (note).

* Indicates decisions, like those of the lower courts in this case, denying set-offs arising out of a contract other than the contract upon which the libel was based.

484 at 488. Theretofore, the defendant could only exercise a right of recoupment by which he could reduce or off-set plaintiff's demand by asserting damages arising out of the transaction constituting the plaintiff's demand. 80 Corpus Juris Secundum 5.

Suits in equity and in admiralty remained unaffected, however, by the statutes just cited and their counterparts in the American colonies which only applied to actions at law.

Equitable relief equivalent to a set-off, of course, remained available to prevent injustice in certain classes of cases, as where the plaintiff in an action of law was insolvent or where plaintiff's claims were incurred upon a mutual credit. (Per L. Hand, J., in *Susquehanna* v. *Anderson,* 1921 S. D. N. Y. 275 Fed. 355.)

In admiralty, however, the right of set-off remained approximately the same as the right of recoupment had been at common law. There were and are good and obvious reasons why admiralty set-offs should not extend further.

In the first place, admiralty jurisdiction of subject matter is restricted. Unlike courts exercising jurisdiction at law, admiralty courts cannot determine all disputes which may exist between the parties to a given suit and thereby avoid circuity of action which is the basic reason for permitting set-offs in actions at law.

Secondly, as the government's brief recognizes (pp. 23-25), an extension of the right of set-off may adversely affect seamen's rights or the adversary's right to a trial by jury.

Thirdly, unrelated set-offs would undoubtedly complicate and impair exercise of the vital right of admiralty suitors to obtain security by a libel *in rem* or by process of foreign attachment. Under existing admiralty practice, a respondent or claimant in such a case may obtain security

upon a cross-claim arising out of the same contract or cause of action as provided in Admiralty Rule 50 of the rules of practice promulgated by this Court. (Petitioner's Brief, pp. 3-4.) If set-offs and cross-libels unlimited as to subject matter were permitted, however, the right to security on such claims might easily become a means of greatly impairing the effectiveness of traditional admiralty right of libelants to obtain security by suits *in rem* or by foreign attachment in suits *in personam*.

Fourthly, admiralty proceedings commonly involve the rights of underwriters and others in addition to the parties in whose names the suits are brought and defended. (*United States* v. *Atlantic Mutual Ins. Co.*, 1952, 343 U. S. 236). It is easy to see that such rights might be adversely affected if a multiplicity of extraneous issues could be brought in and the transaction upon which the libel was founded should be lost to view.

Fifthly, the United States itself has recognized the need of restricted set-offs in admiralty by providing in the Public Vessels Act (46 U. S. C. 783) that a private person sued by the United States in admiralty may only "claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action * * *."

In any event, it is not open to government counsel in this case to argue about the soundness of the admiralty rule as applied to the facts of this particular litigation. The rule exists and has the force of law. (28 U. S. C. Sec. 2071, quoted *supra*, p. 4; *Hicks* v. *Bekins*, 1940, 115 F. (2d) 406.)

Debate as to the merits of the existing rule is useless, because modification of the rule could only be accomplished by a new general rule of admiralty practice promulgated by this Court to become effective not earlier than 90 days

after having been reported to Congress by the Chief Justice as provided in Section 2073 of Title 28, United States Code (quoted *supra* at p. 5).

Meanwhile, the Suits in Admiralty Act unquestionably requires that the present rule of practice prohibiting set-off of claims unrelated to the transaction in the libel, shall be binding upon the United States in suits brought under the Act.

The considerations above stated make unnecessary any detailed reply to the Second Point of the brief for the United States (pp. 21-29) in which the petitioner argues that the "jurisdiction" of the admiralty courts over set-offs in government suits should not be limited to those arising from the same transaction.

A special rule applicable to government cases is not permissible because, as we have shown, the Suits in Admiralty Act requires observance of the rules of practice which obtain in suits between private parties, including the rule against unrelated set-offs.

Petitioner's argument is also untenable because it fails to recognize that statutory authorization would be necessary to enlarge the set-offs cognizable in admiralty suits and no such authorization exists for changing the rules by a decision in this or any other litigated case.

Furthermore, petitioner's argument would have no merit even if the advisability of revision of the existing admiralty rules of practice were one of the questions presented for review in this case.

The substance of petitioner's argument is that the reasons which justify the rule against unrelated set-offs in other cases have no applicability to the facts of the present case, because it does not involve rights of seamen or any complexity of issues or parties or any right to jury trial or any non-maritime set-offs.

It is unthinkable, however, that the enforcement or application of a statute or rule having statutory force should be optional or discretionary in each case, depending on whether the case presents any of the circumstances which caused the statute or rule to be adopted. Moreover, the petitioner's brief fails to state all the reasons which support the admiralty set-off rule.

Two other reasons are given in petitioner's brief (pp. 25-6) for disregarding the rule. One is that admiralty should follow the equity rule regarding set-offs which was established in 1912 (226 U. S. 657, Rule 30) and has since been merged into Rule 13 of the Federal Rules of Civil Procedure. The analogy to equity is improper because of the differences in jurisdiction between admiralty and equity. The argument is untenable, in any event, because both the equity Rule 30 and Rule 13 of the Federal Rules of Civil Procedure were adopted under the authority of general statutory enactments.

The case of *British Transport Commission* v. *United States*, 1957, 354 U. S. 129, is cited by petitioner as an authority for following equity practice as to set-offs in admiralty suits. In fact, however, the cross-claim allowed to be asserted in that case was for damage resulting from "the identical incident" which was the subject matter of the limitation of liability proceeding in the district court.

Similar circumstances make inapplicable petitioner's next suggestion that admiralty should have the same jurisdiction over set-offs as do the Court of Claims and the District Courts under Sections 1346 (c) and 1503 of Title 28, United States Code. Those sections are not applicable to admiralty suits. On the contrary, they are illustrations of the need of express statutory authority for set-offs and counter-claims unrelated to the contract or transaction upon which the action is brought.

Petitioner's further suggestion in the footnote (p. 26, n. 16) that set-offs in admiralty are justified by Section 71 of Title 31, United States Code is plainly untenable. That Section merely relates to the power of the General Accounting Office to settle and adjust claims. It does not in any way affect or purport to affect the practice in any of the courts of the United States. In *McKnight* v. *United States*, 13 C. Cl., 292, 307, the Court referred to the decisions of the Comptroller as "conclusive upon the executive branch of the government, **but not upon Congress or the courts**". (Emphasis ours.)

Petitioner's final point (Brief, pp. 27-29) that set-offs of unrelated claims are not expressly prohibited by certain written rules of practice is beside the point. The point is that such set-offs cannot be made in admiralty because they lack statutory authorization and that fact has been repeatedly recognized by the admiralty courts. Therefore, it is unnecessary that the written rules of the court should expressly exclude such set-offs. In fact, however, Rule 16 of the District Court is irreconcilable with the petitioner's claim that unrelated set-offs may be pleaded in admiralty. (See petitioner's brief, p. 28.)

Finally, there is also one cogent reason why this Court would not be justified in laying down any new rule even if it were free to do so in this case. That reason was recognized and stated in the recent decision in *Hawkins* v. *United States*, 358 U. S. 74. In footnote No. 4, at p. 82, Mr. Justice Stewart said, in his concurring opinion:

> "It is obvious, however, that all the data necessary for an intelligent formulation [of a new rule] 'in the light of reason and experience' could never be provided in a single litigated case."

## SECOND POINT.

ENFORCEMENT OF THE ADMIRALTY RULE PROHIBITING SET-OFFS OF UNRELATED CLAIMS DOES NOT PREJUDICE THE INTERESTS OF THE UNITED STATES IN ANY RESPECT OR CONFLICT WITH THE STATUTORY AUTHORITY OF THE GENERAL ACCOUNTING OFFICE TO SETTLE AND ADJUST CLAIMS BY OR AGAINST THE UNITED STATES.

In 31 U. S. C. Sec. 227 (quoted at p. 3, *supra*) Congress has specified the withholding or set-off procedure to be followed by the General Accounting Office in cases where judgment is recovered against the United States and the judgment creditor owes or is claimed to owe money to the United States.

In such cases, if the judgment creditor denies his indebtedness, the statute requires the United States to prosecute suit against the judgment creditor to establish the disputed claim. If the United States fails to establish its claim or fails to establish it in full, the judgment creditor is entitled to the amount wrongfully withheld together with interest thereon.

This procedure fully protects the United States and, at the same time, gives the judgment creditor some measure of redress, by way of interest, when the government's set-off proves to be unfounded.

In the instant case, the United States has already instituted a separate suit in admiralty on its disputed claim (see p. 7, *supra*). Therefore, in order to protect the United States fully, the General Accounting Office needs only to follow the other steps specified in 31 U. S. C. Sec. 227.

No reason appears why the United States would suffer any prejudice or disadvantage whatever by prosecuting its

disputed claim in the pending separate suit rather than as a set-off to respondent's undisputed claim. In either event, the merits of the government's claim would be determined in the same court upon the same allegations and the same evidence.

Petitioner's contention that such a set-off is a necessary incident of so-called "administrative recoupment" pursuant to 31 U. S. C. Sec. 71, will not bear analysis as the next point of argument shows.

## THIRD POINT.

THE GOVERNMENT'S SET-OFF WAS NOT COGNIZABLE EITHER AS A PLEA OF "PAYMENT" OR AS BEING "THE REAL SUBJECT MATTER OF THE SUIT".

Attempting to circumvent application of the admiralty set-off rule, the first point of petitioner's argument (brief, pp. 12-21) claims that the disputed claim for charter hire alleged in the government's answer was not really a set-off but was either: (A) a plea of "payment" of the undisputed and unrelated freight claim alleged in respondent's libel; or (B) "the real subject matter of the litigation."

Both those contentions are palpable fictions, as we show below.

A. The refusal of the General Accounting Office to pay respondent's admitted freight claim because of the government's unrelated and disputed claim against respondent cannot possibly constitute payment of respondent's claim. Both the District Court and the Court of Appeals so held. (R. 18; Appendix to petitioner's brief, p. 37-40.) An identical holding was also made by the Court of Claims when respondent's claim was before that Court (*supra*, p. 6).

Payment of a debt effects the discharge or satisfaction of the debt. *Restatement, Contracts,* Sec. 386. It is manifest, however, that the debt of the United States to respondent was not discharged or satisfied by the act of the General Accounting Office which the government's brief describes (pp. 2 and 12) as "administrative recoupment" pursuant to 31 U. S. C. 71.

The authority given to the General Accounting Office by that statute is simply to settle and adjust claims by or against the United States. That identical authority had been vested in the accounting officers of Treasury from 1817 up to the establishment of the General Accounting Office in 1921 (3 Stat. 366).

Neither that statute nor any other purports to or could constitutionally give the General Accounting Office the right to discharge or satisfy a debt of the United States, without the consent of the creditor, merely by asserting a claim of equal amount by the United States against the creditor.

Admission of the untenability of the contention of payment appears not only in the government's express allegation of non-payment in its separate libel (quoted *supra,* p. 7) but also in petitioner's brief (p. 14). Petitioner says: "To be sure, the debt owed by the Government is not discharged by the mere *ipse dixit* of the Comptroller General that the claimant, himself, is indebted to the United States."

Obviously, if the government's debt to respondent was admittedly not discharged by the *ex parte* act of the Comptroller in withholding payment because of the government's cross-claim, then respondent's cause of action remained unimpaired. *McKnight* v. *United States,* 13 C. Cls. 292, 306. Therefore, the Comptroller's act could not support a defense on the ground of payment or on any other ground. A cross-claim is not a defense but a separate demand.

*Merchants Heat etc. Co.* v. *Clow & Sons*, 1907, 204 U. S. 286, 289; *Virginia-Carolina Chemical Co.* v. *Kirven*, 1909, 215 U. S. 252 at pp. 257-8.

No greater legal significance is given to the Comptroller's acts by 31 U. S. C. 71, either expressly or impliedly, than to the similar act of any private debtor in withholding payment of his debt because of his own claim against the creditor.

Mutual debts, even if liquidated and admitted, do not extinguish one another "either automatically or by manifestation of election of one party. Either agreement of the parties or judicial action is necessary". *Williston on Contracts*, Rev. Ed., Vol. III, Sec. 887 E. As Williston points out, lapse of time may bar recovery on one of the cross debts and leave the other still enforceable. Such lapse of time had, in fact, barred the cross-claim which the General Accounting Office had tried to set-off against the government's admitted debt in the case of *Grace Line* v. *United States*,[3] 225 F. (2d) 810.

For the foregoing reasons, the Courts below were clearly right in holding that the petitioner's attempted set-off of its unrelated and disputed claim against respondent was not cognizable as a plea of payment of the debt admittedly owing from the United States to respondent.

In the District Court, Judge Dimock said (R. 18):

> "The government either paid the freight to Isthmian or it did not. If it paid the freight it did so by cancelling its claim against Isthmian for charter hire. Suit for the charter hire is completely inconsistent with any such cancellation. See *Climactic*

[3] The Court of Appeals, Second Circuit in the instant case expressly adopted (R. 24) the reasoning in its opinion in the *Grace Line* case which was argued at the same time and reported at 225 F. (2d) 810 and is also printed as an appendix to petitioner's brief.

*Rainwear Co.* v. *United States*, Ct. Cl., 88 F. Supp. 415."

The Court of Appeals said:

> "* * * it is abundantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States" (Petitioner's brief, p. 40).

None of the decisions cited by petitioner on this point (Brief, pp. 13-15) are inconsistent with the foregoing propositions. On the contrary, *McKnight* v. *United States*, 13 C. Cls. 292, supports respondent's argument.

The *McKnight* case involved a suit brought in 1877 to recover a balance of $9,000 claimed to be due to plaintiffs' assignor under a certificate of indebtedness of $30,675 for flour delivered to the army in 1861. The certificate had been issued by the accounting officers of the Treasury in January 1873. The balance of $9,000 represented a sum withheld from the amount certified because of an indebtedness of the plaintiff's assignor upon a surety bond given by him to the United States.

The Court of Claims made no decision whatever upon the merits of the withholding of $9,000 but merely held that the certificate upon which the plaintiffs sued was "not *prima facie* evidence to charge the United States". Parenthetically, attention is invited to the fact that the *McKnight* decision demonstrates the error of petitioner's contention (brief, pp. 15-21) that a government set-off against an admitted debt makes the set-off, rather than the debt, "the real subject matter" of a suit brought upon the debt.

Richardson, J. speaking in regard to the effect of certificate of the accounting officers of the Treasury said (p. 306):

> "The certificates and orders made previously to the issuing of the drafts are departmental proceed-

> ings, directions among the several public officers, none of which are delivered to the claimants, or even allowed to be seen and examined by them, without leave from some officer having authority to grant it. Parties gain no new rights thereby, into which their former rights of action are merged, and upon which actions can and must be brought as upon an award. There is nothing in the proceedings in the nature of a submission to arbitration."

He further said, (p. 312):

> "* * * accounts and balances stated by those officers, involving controverted questions of law as well as of fact, depending upon the genuineness, validity, and legal effect of documents, as the assignment of the voucher in this case, which are not matters of public record nor within the knowledge of officers of the department in which they are filed, and are accepted upon evidence which would not be admitted in any court of justice, are not *prima-facie* evidence to charge the United States in suits against the Government."

Plaintiffs' case failed, therefore, because they had failed to establish the validity of the claim from which the deduction had been made. No question was presented as to the legal effect flowing from the act of the accounting officers in setting-off the cross-claim of $9,000.

It necessarily follows from *McKnight's* case, however, that if the certificate of the accounting officers had no legal effect to establish a claim *against* the United States, the acts of those very same officers also lacked any legal force to establish the cross-claim of the United States against the plaintiff's assignor.

*Taggart* v. *United States*, 17 C. Cls. 322, likewise did not involve any holding on the legal effect of set-offs by government accounting officers. The suit was upon a claim against

the United States for failure of the accounting officers of the Treasury to collect the full amount of a judgment for $1,854 which had been recovered by the plaintiff, Taggart, against a private individual named White and had been assigned by Taggart to the United States as collateral security for a balance of indebtedness amounting to $1,119 due from Taggart to the United States.

The accounting officers collected the latter amount from the judgment debtor, White, by withholding it from a debt of $2,000 owed by the United States to White. The Court of Claims merely held that the accounting officers of the Treasury were not required or authorized to withhold from White any more than the amount of the government's claim against Taggart for which the judgment was merely collateral security. Hence, the Court held that the United States was not liable for the uncollected portion of the judgment.

*Schooner Henry* vs. *The United States*, 35 C. Cls. 393, was a decision even more remote from the point because the Court of Claims refused even to entertain a cross-claim of the United States in a special proceeding under an appropriation act providing for payment of French spoliation claims. The Court pointed out, 35 C. Cls. 395 that the Act of Mar. 3, 1875 (now 31 U. S. 227, quoted at pp. 3-4, *supra*) gave the Treasury "adequate power to guard the United States against the payment of judgments or claims when there exists in the Department a demand against the claimant which is the proper subject of set-off.

"We decide nothing affecting the rights of the parties as they may exist in the Treasury Department * * *."

*United States* v. *Munsey Trust Co.*, 1947, 332 U. S. 234, which is also cited repeatedly in petitioner's brief, is not pertinent to any issue here. The case involved the disposition of $12,445, representing percentages of progress payments retained by the United States under contracts for

repairing and painting certain public buildings. The contracts had been completed but a surety of the contractor had been required to pay for certain labor and material furnished under certain of the contracts. The United States also had an undisputed claim of $6,731 for damages sustained as a result of the contractor's failure to perform a contract independent of the other group of contracts.

The District Court in the District of Columbia appointed a receiver to collect the amounts due from the United States to the contractor. The General Accounting Office deducted the government's claim of $6,731 for damages and paid the receiver the balance of $5,714.00. The receiver then brought suit in the Court of Claims for the balance which had been withheld by the General Accounting Office. The Supreme Court reversed the decision of the Court of Claims and held that the government's deduction of its independent claim was a proper set-off.

The controversy before the Court did not present any dispute as to the Court's jurisdiction of the government's set-off. Jurisdiction is expressly conferred upon the Court of Claims by Section 145 of the Judicial Code (now Section 1503 of Title 28, U. S. C.) over *all set-offs* or demands by the United States against plaintiffs in the Court of Claims.

Furthermore, as the claim of the United States was undisputed, the case did not involve any question whether the withholding constituted "payment". The only contest was whether the cross-claim of the United States should be postponed or should yield priority to the claim of the surety. The Court held that the surety had no rights superior to the rights of the United States to set off the amount of its claim for damages.

Five other cases are cited by petitioner for a proposition which would be irrelevant here, even if correct. The proposition is stated thus (Brief, p. 14):

"• • • when the United States withholds payment on a debt owed by it and applies it to a valid claim of its own, the indebtedness of the claimant to the United States is discharged, and, conversely, the substance of his claim against the United States is destroyed. *McKnight* v. *United States*, 98 U. S. 179; *United States* v. *American Surety Co.*, 158 F. 2d 12, 13 (C. A. 5); *Sanders* v. *Commissioner of Internal Revenue*, 225 F. 2d 629, 637 (C. A. 10), certiorari denied, 350 U. S. 967; *American Railway Express Co.* v. *United States*, 62 C. Cls. 615, 636, certiorari denied, 273 U. S. 750; *Morgan* v. *United States*, 131 F. Supp. 783 (S. D. N. Y.)."

The proposition stated is irrelevant for two reasons. In the present case, the United States is asserting a disputed claim and not a "valid claim", in the sense of its being an admitted or indisputable claim.

Secondly, the United States does not concede that its claim against respondent has been discharged. On the contrary, it has a separate suit pending upon its claim (*supra*, p. 7) and in that suit it alleges that no part of its claim has been paid and it is "now due and owing" to the United States from the respondent.

In any event, none of the five cases cited stand for the proposition stated by petitioner. The *McKnight* case was an affirmance of the Court of Claims decision already stated, *supra*, p. 24.

*American Railway Express* (62 C. Cls. 615) involved, in part, the validity of a provision in the express company's form of receipt to the effect that claims in respect of shipments should be made within four months and suits for loss, damage or delay instituted within ten days.

The United States did not file formal claim or bring suit but instead withheld payment of charges due from the government to the express company for carrying subsequent

shipments. The Court held that such action "subserved" the purpose of the requirement of written notice of claim.

*Morgan* v. *United States*, 131 F. Supp. 783 was a case where judgment was recovered against the United States and a tax claim was set-off against a judgment creditor as provided in 31 U. S. C. Section 227 (*supra*, pp. 3-4). It was held that the set-off took precedence over an attorney's lien asserted against the attachment by counsel for the judgment creditor.

Neither of the other two cases, *United States* v. *American Surety Company*, 158 F. (2d) 12, and *Sanders* v. *Commissioner*, 225 F. (2d) 629, involved any dispute as to the propriety of the withholding. They merely held that if the government has recouped all or part of its claim against the debtor by withholding, it must allow credit for the amounts so withheld and cannot recover twice for the same amount.

In conclusion on this point, it is fitting to quote the statement of Mr. Justice Swayne in *McKnight* v. *United States*, 98 U. S. 179 at 186:

> "With few exceptions, growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter."

It is clear that if a private person had withheld payment of an independent claim against respondent as a set-off against a claim of respondent, such withholding would not constitute a defense in admiralty to respondent's claim. It would not be cognizable either as a set-off or on the fictitious theory that respondent's claim had been "paid" by the withholding. No reason has been shown by petitioner why the United States should stand in a better position than a private party. On the contrary, Congress

has expressly provided in the Suits in Admiralty Act that United States should be governed by the same rules which apply to private parties.

B. No extended argument is necessary to show the untenability of the petitioner's alternative contention (pp. 15-21) that "the real subject matter of this litigation" is "the validity of the Government's contested claim, not the libelant's uncontested claim."

Petitioner asserts that its admission of respondent's claim left petitioner's "affirmative defense" as the only issue in the case (Brief, p. 15), but its contention is plainly invalid for several reasons.

In the first place, the contention assumes the very point it pretends to establish. It assumes that the government's disputed claim for charter hire constituted "an affirmative defense", and, therefore, presented issues to be decided in this litigation.

Nothing could be plainer, however, than the fact that that the petitioner's attempted set-off of its disputed and unrelated claim for charter hire was not cognizable in this admiralty suit, as the first point of this brief shows. Being excluded from the case, petitioner's claim against respondent could not possibly raise issues in the case either by way of an affirmative defense or otherwise.

Secondly, petitioner's contention involves a manifest absurdity. In effect, the contention amounts to saying that respondent's suit is not upon its affirmative claim for freight but, rather, is to establish the invalidity of the government's claim against respondent. Thus, petitioner would treat a defense as a cause of action.

In fact, respondent's only cause of action against petitioner was its claim for freight (now merged in the decree of the District Court). Respondent could not possibly have

a cause of action upon petitioner's claim *against* respondent for charter hire, though respondent may have a good defense to that claim. Hence, it is absurd to suggest that "the real subject matter" of respondent's suit against the United States is the claim of the United States against the respondent.

One simple test of the fallacy of petitioner's contention is provided by Sec. 5 of the Suits in Admiralty Act (46 U. S. C. 745) which fixes a limit of two years "after the cause of action arises" upon the bringing of suits of the United States under the Act. Respondent's claim for freight arose when it carried and delivered petitioner's goods in April, 1953. The petitioner's withholding did not occur, however, until June 3, 1953 (R. 8).

If respondent had waited until June 3, 1955, to file its libel for freight, the United States would undoubtedly have pleaded the two-year limitation as a bar to respondent's claim. In fact, although respondent's suit was brought on March 29, 1955 (R. 2, 3), the government contended (unsuccessfully) in the Court of Appeals that respondent's claim was time barred because the libel failed to allege facts showing that it had been filed within two years after the cause of action arose.

In the third place, if the petitioner is correct in its contention that the Comptroller's withholding in this case was authorized by 31 U. S. C. 71 (Brief, p. 13), respondent could have no cause of action against the United States or the Comptroller General for the act of withholding. On petitioner's theory, the Comptroller's act was an exercise of his lawful administrative powers. It would not constitute either a tort or a breach of contract upon which a cause of action would arise in respondent's favor and be enforceable under the Suits in Admiralty Act or under any other

existing statutory authority permitting suits against the United States.

Nor is there any special statute providing for judicial review of withholdings by the Comptroller General in the admiralty courts or in any other court of the United States.

Fourthly, the decision of the Court of Claims (131 C. Cls. 472) precludes the United States from making the contention that its disputed claim against respondent is the real subject matter of this suit. As we have shown, (*supra*, p. 6), respondent's claim was presented in the Court of Claims, as an action for money had and received or, alternatively, upon an account stated. The Court of Claims expressly held, however, that respondent's sole cause of action was its claim against the United States for freight and that such claim was cognizable only in the District Court under the Suits in Admiralty Act.

None of the decisions cited by petitioner relates to admiralty practice and none of them is otherwise in point. *United States* v. *New Haven, etc. Ry. Co.*, 1957, 355 U. S. 253 was a suit under the Tucker Act which expressly permits the United States to make "any set-off" (28 U. S. C. 1346(c)). Furthermore the decision related only to the question whether the plaintiff carrier or the United States had the burden of proving a set-off made by the United States under the special conditions provided in Sec. 322 of the Transportation Act, 1940 (54 Stat. 955, 49 U. S. C. 66). That statute required the United States to pay certain common carrier freight bills "upon presentation" and "prior to audit" but reserved to the United States the right to deduct any overpayments "from any amount subsequently found to be due such carrier." The decision was that the burden of proof remained upon the carrier to establish its right to the freight charged to and paid by the United States but later deducted from other sums

due the carrier (in accordance with Sec. 322), as having been an overpayment.

In that case, the special statutory provision of the Transportation Act was held to put the United States in substantially the same position as if it had never paid the freight charge which it claimed to be excessive (355 U. S. 261). In such a situation, the railroad plaintiff would, of course, have had to sue upon and establish its claim.

The lack of analogy to the present case is evident. For one thing, the Suits in Admiralty Act and admiralty practice control this case exclusively. Section 322 of the Transportation Act, 1940, is inapplicable. Secondly, the effect of the government's deduction in the *New Haven* case was to require the carrier to establish its affirmative right to the freight charge which the government disputed by its deduction. The government set-off here did not challenge respondent's affirmative claim in any way, but was entirely distinct from it.

*Alcoa S. S. Co.* v. *United States*, 1949, 338 U. S. 421, was not a suit in admiralty but a suit at law under the Tucker Act (now 28 U. S. C. 1346). The United States set-off a claim for an erroneous payment of freight against plaintiff's claims for admitted debts from which the amount of the erroneous payment had been deducted. In suits under the Tucker Act, the United States has express statutory authority to claim "any set-off, counter-claim, or other demand whatsoever on the part of the United States against any plaintiff commencing an action under this section" (28 U. S. C. 1346(c)). The decision has no bearing whatever on set-offs in suits brought against the United States under the Suits in Admiralty Act.

Nor does *Wabash Ry. Co.* vs. *United States*, 1924, 59 C. Cls. 322 (aff. 270 U. S. 1), present any analogy. The United States had paid certain freight charges but later disputed

portions of the charges and deducted what it had paid on such portions, from other undisputed obligations of the United States to the carrier. The carrier's suit to recover the sums deducted was held to be timely although brought more than six years after the original services had been rendered but less than six years after the deductions were made. As the plaintiff's bills in that case had been paid, the Court was clearly right in holding that the plaintiff had no cause of action until the deductions were made. The holding of the Court of Claims on that point was not even discussed in the Supreme Court's opinion.

In any event, the decision in no way supports petitioner's contention that its claim against respondent rather than respondent's claim against petitioner was the subject matter of respondent's suit.

We conclude on this point by quoting what the Court of Appeals said in two other cases which were argued and decided along with the instant case. In denying petitioner's identical contention in the companion *Grace Line* case (Brief, p. 42; 255 F. (2d) 815) the Court said:

> "No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government but rather an attempt to interpose a set-off which is barred by established admiralty procedure."

Commenting further on the government's tactics, the Court of Appeals said in *Isbrandtsen Co.* v. *United States*, 255 F. (2d) 817 at 819:

> "This and similar efforts to pierce the clear and unequivocal allegations of a claim or cause of action in a libel or complaint, and characterize the claim or cause of action as one for wrongful withholding of moneys by the United States can only result in confusion and injustice. Rules of practice and procedure

relating to defenses, counterclaims and other matters are formulated for the purpose of simplifying the administration of justice and making it more expeditious, more certain and more effective. These rules cannot accomplish their purpose if pleadings clear on their face are construed to mean something quite different from what is plainly alleged therein."

## FOURTH POINT.

THE DISTRICT COURT'S ALLOWANCE OF INTEREST ON THE WHOLE AMOUNT OF THE FINAL DECREE CONFORMED TO THE PRINCIPLES AND PRACTICE APPLYING IN ADMIRALTY SUITS BETWEEN PRIVATE PARTIES AND WAS ALSO EXPRESSLY AUTHORIZED BY THE SUITS IN ADMIRALTY ACT.

The third point of the brief for the United States (pp. 30-32) contends that the District Court erred in awarding interest at 4% upon the whole amount of the final decree. (R. 21) Petitioner claims that this caused a "compounding of interest" to the extent that, interest will run, until the decree is satisfied, on that portion [i.e.—$2,070.51] of the total recovery which represented interest at 4% on respondent's principal claim of $115,203.76, from the date when the libel was filed to the date of the decree.

Sec. 3 of the Suits in Admiralty Act (46 U. S. C. 743, quoted *supra*, pp. 2-3), expressly provides that where a decree against the United States is for a "money judgment", it "may include * * * interest at the rate of 4 per centum per annum until satisfied".

The words "until satisfied" and "money judgment" make it quite clear that Congress authorized the allowance of interest upon the amount of the *decree* as distinguished from the amount of the claim only. Any possible doubt on the point is removed by the further provisions of Section 3 of the Act that "interest shall run as ordered by the Court"

and that suits under the Act shall be "determined according to the principles of law and the rules of practice obtaining in like cases between private parties".

In admiralty suits between private parties, the allowance of interest is discretionary, but it is ordinarily allowed upon the full amount of the final decree, including interest. *The Blenheim*, 1883, C. C. Mass., 18 F. 47; *The Umbria*, 1892, C. C. A. 2d, 59 F. 475.

An illustration of the usual form of final decrees for "money judgments" in admiralty appears in Benedict on Admiralty, Sixth Edition, Vol. III, p. 146, form No. 335, which contains the following provision:

> "ORDERED, ADJUDGED AND DECREED, that the libelant recover of and from the respondent herein the sum of $500.00, with interest thereon, from * * * amounting to $....., together with the libelant's costs taxed in the sum of $..... and amounting in all to the sum of $..... with interest thereon until paid * * *."

The right of a libelant to interest upon the whole amount of a decree against the United States under the Suits in Admiralty Act was expressly upheld by the Circuit Court of Appeals, Third Circuit in *National Bulk Carriers* v. *United States*, 1948, 169 F. (2d) 943 at 951.

Petitioner's brief (p. 32, n. 22) purports to distinguish the *National Bulk Carriers* case, but its statement of the case is incorrect. Petitioner's statement suggests that the Court awarded interest "as an element of just compensation" for which "specific statutory authority * * * is not deemed required". In fact the *National Bulk* case was a suit brought under the Suits in Admiralty Act by a shipowner claiming for a total loss upon a policy of war risk insurance issued by the United States. It is true that the policy provided for payment of "just compensation" in

case of loss of the insured vessel but the suit did not involve a claim under the Fifth Amendment for just compensation.

In respect of interest, the case presented two questions but the only one which is material here did not concern "just compensation". The decree of the District Court had allowed interest on the whole amount of the decree and the government contended, as it does here, that "this results in compound interest." The Court overruled the government's contention and affirmed the decree. Speaking through McLaughlin, C. J., the Court said on this point (p. 951):

> "The valuation interest is palpably a part of the main award and so intended. It is proper in theory and in practice. 'Interest in such a case is allowed as well as costs; and in case of appeal, the interest is cast upon the whole amount of the decree in the court below; including the costs as well as the amount of the damage'. The Wanata, 95 U. S. 600, 613, 34 L. Ed."

The other interest question was whether the recovery for the loss should include interest at 4% from the date of the loss or from the date when the libel was filed. The court held that the provisions of Section 5 of the Suits in Admiralty Act precluded allowance of interest prior to the time when the libel was filed. The court declined to accept the owner's contention that the government's contractual undertaking to pay "just compensation" carried with it the obligation to pay interest from the time the cause of action arose. (169 F. 2d 951). In support of this conclusion, the Court cited *United States* v. *Thayer—West Point Hotel Company*, 329 U. S. 585, 590.

The foregoing considerations are more than sufficient to meet the government's objection, whether or not the decree could properly be said to allow "compound interest." In fact, there was no such allowance. The decree merely allowed

simple interest upon a fixed sum which was the entire amount of the decree. The various component sums which entered into the computation of the total sum, no longer existed as separate claims because they were all merged into a single judgment debt. *Morley* v. *Lake Shore R. Company*, 146 U. S. 162, 168. As the whole amount of the decree was due and payable when it was entered, there is no reason whatever why interest should not run on the whole amount until the decree is satisfied.

None of the cases cited in petitioner's brief (pp. 31-32) involves a decree under the Suits in Admiralty Act. Most of them are based upon the obsolescent doctrine of sovereign immunity which has no application whatever to this suit because of the express requirement of the Act that this suit shall be "determined according to the principles of law and the rules of practice obtaining in like cases between private parties".

## LAST POINT.

THE OPINIONS BELOW WERE CORRECT AND THE FINAL DECREE OF THE DISTRICT COURT SHOULD, THEREFORE, BE AFFIRMED WITH COSTS.

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Respectfully submitted,

CLEMENT C. RINEHART,
Counsel for Respondent
Post Office Address.
One Twenty Broadway
New York 5, New York

WALTER P. HICKEY,
Of Counsel